MAR 25 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 656

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Shareholders' Protective Committee's and Long Beach Federal Savings and Loan Association's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

and

Motion for Order Permitting Consideration of Petitions for Certiorari Without Printing of Additional Record.

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IN THE

Supreme Court of the United States

October Term, 1953

No. .....

(Nos. 12575, 12893 and 13055-CCA-9)

MALLONEE, *et al.*, as the Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, *et al.*,

Petitioners and Appellants,

vs.

AMMANN, Conservator, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, HOME LOAN BANK BOARD, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Respondents and Appellees.

Motion for Order Permitting Consideration of Petitions for Certiorari Without Printing of Additional Record.

To: The Honorable Justices of the United States Supreme Court:

The motion of Mallonee, Bucklin and Fergus, as the Shareholders' Protective Committee of Long Beach Federal Savings and Loan Association, and Long Beach Federal Savings and Loan Association, respectfully shows:

1. Prior United States Supreme Court Decisions and Mandate.

That actions have been pending in the United States District Court for the Southern District of California since 1946. Such actions include Mallonee, *et al.* v. Fahey, *et al.*, No. 5421-P.H. That said actions were the subject of prior appeals and writs to this Honorable United States Supreme Court in 1946 and 1947, Nos. 687 and 133 Misc., October Term 1946, resulting in the opinions of *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030 (decided June 23, 1947), and *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (writ denied June, 1947).

That in 1948, several appeals (subsequent to said United States Supreme Court decisions) were taken by respondents to the United States Court of Appeals for the Ninth Circuit, and thereafter dismissed.

That in 1950, applications by respondents for writs of prohibition, injunction, etc., attacking the jurisdiction of said United States District Court were denied by said Court of Appeals.

That in 1952, in opinions reported in 196 F. 2d 336, and 200 F. 2d 420, said Court of Appeals reversed a preliminary injunction and an award of attorneys' fees.

That certiorari of said last two decisions was denied by this Court in May of 1953.

2. Voluminous Records on Appeals Have Been Printed on Previous Appeals.

That the record on appeal in said proceedings has become extremely bulky and voluminous. That considerable portions of said record have been printed on previous appeals and proceedings.

3. 1953 Seven-page Opinion of Court of Appeals Based Solely on Lack of Jurisdiction.

That the November, 1953 opinion of the Court of Appeals, certiorari of which is herewith sought, is decided solely on the question of jurisdiction of the District Court, a matter of law which petitioners believe can be adequately presented without necessity for printing of additional record on appeal.

Petitioners have incorporated certain matters of record in an appendix to their certiorari petitions. Petitioners believe this method of presentation will spare the Supreme Court from any necessity to search through the voluminous record.

4. Court of Appeals Ruled Without Printing of Record (Except on One Appeal).

In its seven-page opinion, the Court of Appeals decided questions of jurisdiction only, and did not consider either the merits or the facts. Six appeals were thus decided without printed records (except in one appeal).

What petitioners believe to be the fundamental error, *i. e.*, the question of jurisdiction of the District Court, is principally a question of law.

5. Efforts to Stipulate to Record for Certiorari.

Petitioners have sought stipulations from counsel for respondents that no additional record need be printed. Respondents have stated they believe the matter should properly be brought before the United States Supreme Court by motion rather than stipulation, but that respondents also desire to avoid additional printing of record for certiorari and would not oppose such motion.

WHEREFORE, petitioners respectfully pray an order of this Honorable United States Supreme Court that petitions for certiorari may be considered by the Court, upon the record from the Court of Appeals and the District Court without necessity for printing additional record.

Dated: March 23rd, 1954.

Respectfully submitted,

WYCKOFF WESTOVER,
Attorney for Petitioner Mallonee, et al., Shareholders' Protective Committee;

CHARLES K. CHAPMAN,
Attorney for Petitioner Long Beach Federal Savings and Loan Association.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

MALLONEE, BUCKLIN and FERGUS, Shareholders' Protective Committee, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioners,

vs.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Shareholders' Protective Committee's and Long Beach Federal Savings and Loan Association's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Mallonee, Bucklin and Fergus, Shareholders' Protective Committee, and Long Beach Federal Savings and Loan Association, pray that writs of certiorari issue to review the orders and judgments entered November 23, 1953 (rehearing petitions denied December 28, 1953), in

Appeal Nos. 12575, 12893, and 13055, in the United States Court of Appeals for the Ninth Circuit, entitled:

Appeal Nos. 12575, 12893, and 13055

JOHN H. FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

RONALD WALKER, Special Master, *et al.*,

Appellees.

and respectfully represent as follows:

Opinions Below.

The 7-page opinion in these Appeals, Nos. 12575, 12893, and 13055, will be found in Adv. Fed. 2d, Vol. 208, at page 197, No. 2, issue of January 25, 1954. It is also pages 4 to 12 of the Appendix filed herewith.

Jurisdiction.

Jurisdiction of this United States Supreme Court is invoked:

(a) Under Title 28, United States Code, Section 1254, and

(b) Under Section 1253.

The original action was commenced by a complaint based upon allegations that Acts of Congress were unconstitutional, and demanding an accounting. Upon the application for injunction, under Section 380(a) of Title 28, United States Code, as it existed in 1946 (now Title 28, United States Code, Sec. 1253), a three-judge statutory Court was convened.

By direct appeal in *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, 91 L. Ed. 2030, and by original proceedings (writ of prohibition, etc.) in *Ex parte Fahey*, 332 U. S. 258, 91 L. Ed. 2041 (1947), respondents attacked the jurisdiction of the District Court.

The United States Supreme Court decided part of the constitutional questions, denied the writ, and remanded the case to the District Court for further proceedings. Upon such remand the District Court entered several final judgments, including judgment that respondents make "a full and complete accounting."

Appeals were taken and dismissed from certain of these judgments. The balance became final judgments from lack of appeal.

In 1950, the Court of Appeals also denied respondents' applications for writs of prohibition, etc.

Jurisdiction of the District Court.

Jurisdiction was originally invoked in May and July, 1946, under:

(a) Old Title 28, United States Code, Section 380(a), and Section 118 (now Sec. 1655), by the Shareholders' Protective Committee, representatives of the class of 16,000 depositors, seeking preliminary and permanent injunctions based upon unconstitutional Acts of Congress, and an accounting;

(b) Old Title 28, U. S. C. A., Section 41(26) (now Secs. 1335, 1397 and 2361), through interpleader by deposit into the registry of the District Court of titles to, and payments upon, the homes of approximately 8,000 borrowers from the seized mutual savings association.

Over $14,000,000.00 of assets remain on deposit in the registry of the District Court, subject to pending foreclosure actions brought by respondents.

The District Court entered final judgment against respondents for "a full and complete accounting" to petitioners. (14 F. R. D. 273, at 320.) No appeal was ever taken from such final judgment. Respondents expressly consented (by written approval) to the District Court's order, appointing their own former attorney as Special Master to assist the Court in the accounting.[1]

Their first accounting was rejected by the District Court. (See Appx. p. 23.) Unable to account, respondents attacked the jurisdiction of the District Court, and appealed from interim non-appealable orders allowing fees to the Special Master for, among other things, hearing said accounting.

The Court of Appeals has reversed such non-appealable orders and held the District Court without jurisdiction.

Questions Presented.

1. Does enforcement of a final United States Court judgment against a Federal conservator for "a full and complete accounting" to shareholder-depositors who charge such conservator with fraudulent falsification of records and misappropriation of their seized savings, "present no justiciable controversy within the jurisdiction of the Federal Court" and require "functions beyond the power of the District Court to undertake"?[2]

---

[1]See Signature Plate opposite this page.

[2]The Court of Appeals has so held in its opinion, page 8 of Appendix.

The undersigned hereby consent to and approve the foregoing Order.

Westover and Smith
by Wyckoff Westover - attorneys for the Plaintiffs - Petitioners

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Fed Farms Corp

James Mc Carter
US ATTORNEY

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FOR HOME LOAN BANK BOARD

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John Wright

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The undersigned hereby consent to and approve the foregoing Order.

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John Wright
Attys for said party Defendant
and Resp. claiming adverse
Home Loan Bank of Los Angeles

Raymond Cremaring
Atty for Defendant Claimant
Robert A. Wallis

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2. Can a Court of Appeals entertain appeals from orders expressly interim and not final under F. R. C. P. 54(b), and upon such appeals, reverse the non-appealable orders and thereby prevent enforcement of five-year final United States District Court judgments from which no appeals were ever taken?

Statutes Involved.

(a) The Federal Savings and Loan Association creative sections of the Home Owners' Loan Act of 1933, 48 Stat. 128, Title 12, United States Code, Section 1461 *et seq.;*

(b) The Administrative Procedure Act (U. S. C. A., Title 5, Secs. 1001 to 1011, incl., Public Law 404, 79th Cong., Chap. 324, 2nd Sess.), as applied to Federal conservator's accounting for seized savings upon the demands of depositors, who charge fraudulent falsification of accounts and misappropriation of the seized savings;

(c) The Federal Savings and Loan Insurance Corporation creative sections of the National Housing Act, 48 Stat. 1246, Title 12, United States Code, Section 1724 *et seq.;*

(d) The application of the interpleader statutes (old Title 28, U. S. C., Sec. 41(26), new Title 28, U. S. C., Secs. 1335, 1397, and 2361) to Federal Home Loan Banks, conservators appointed by Home Loan Bank Board and Federal Savings and Loan Insurance Corporation, as receiver, or otherwise;

(e) The Federal Home Loan Bank Act, 47 Stat. 725, Title 12, United States Code, Section 1421, *et seq.;*

(f) Federal Rules of Civil Procedure, Rules 53(a) and 54(b).

Statement.

Respondents Refuse to Account for $26,000,000.00 of Uncounted Cash and Securities, Seized Without Receipts.

In May of 1946, respondent conservator, without notice, hearing, or trial summarily seized $26,000,000.00 of uncounted cash, bearer bonds, and negotiable securities, together with all accounting records and books concerning the same. (14 F. R. D. 273, at 280, 303.) The seized assets were the savings deposits of 16,000 (14 F. R. D. 273, at 303) mutual shareholder-owners of Petitioner Long Beach Federal Savings and Loan Association, a mutual Federal Savings Institution.

Petitioner Savings Association's officers demanded receipts for, and an independent count or audit of, the uncounted cash, bearer bonds, and negotiable securities. (See Appx. p. 45.)

Respondent conservator refused to give any receipts or to permit any independent audit. (See Appx. p. 45.)

Depositors Sue for Accounting.

Seven days after the seizure, petitioners Mallonee, *et al.*, commenced the within class action on behalf of themselves and all 16,000 mutual shareholder owners of the seized savings deposits. (14 F. R. D. 273, at 280.) Their original complaint alleged the seizure violated the United States Constitution; the complaint sought return of petitioner's seized savings *and an accounting*. (See Appx. p. 14.)

September 30, 1946, a statutory[3] three-judge Court at Los Angeles, California, held the seizure unconstitutional,

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[3]Then Section 380(a) of Title 28, United States Code, as it existed in 1946 (now Title 28, U. S. C., Sec. 1253).

ordered the removal of the conservator, the return of the seized assets, *and an accounting.*[4]

Respondent conservator, *et al.,* appealed to the United States Supreme Court, and also sought prohibition, mandamus, etc., against the United States District Court, claiming lack of jurisdiction.

United States Supreme Court Refuses Prohibition.

In June, 1947, the United States Supreme Court, in *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, refused prohibition and mandamus, but, in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, reversed the judgment of the three-judge court and held constitutional the Act of Congress under which the seizure had been made.

Petitioners had charged the summary seizure to have been made maliciously and in bad faith.

The United States Supreme Court, in June, 1947, said in 332 U. S. at page 247:

> ". . . The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in violation of the Constitution . . ."

Further, at page 257:

> "It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the

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[4] *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245. At page 248, the Supreme Court said: "The three-judge court . . . ordered the Conservator to account . . ." See also, 68 Fed. Supp. 418 for opinion of three-judge court.

supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, . . ."

The United States Supreme Court Mandate to the District Court said:

"AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court."

Respondent Bank Board Orders Accounting.

In August of 1947, the President reorganized the seizing agency from a one-man commissioner to a three-man Board.[5] One of the first official acts of the reorganized Board was to rescind the order appointing respondent conservator, require him to restore the remnants of the seized savings deposits, and to file "a full and complete accounting" with the United States District Court. Respondent Board's order said in part:

". . . that the Conservator . . . is hereby . . . . directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a

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[5]When created by Act of Congress, the Federal Savings authority was vested in a five-man Federal Home Loan Bank Board. During the war emergency, such authority had been reorganized into a one-man administration. The 1947 Presidential reorganization restored a bi-partisan board, but with three members instead of the original five. (Reorganization Plan No. 3 of 1947, 12 F. R. 4981.)

copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California."[6]

Respondent Board's order, by its terms, required that a certified copy of such order be filed with the United States District Court. The certified copy of said order was so filed. (14 F. R. D. 273, at 285-305.)

Necessity for Accounting.

When seized, petitioner mutual Federal Savings Association was not indebted to any Federal agency, was completely solvent, had a surplus of over $1,300,000.00, and was highly liquid. (14 F. R. D. 273, at 280-287.)

Of its $26,000,000.00 in assets, over half, or nearly $14,000,000.00 was in cash, bank deposits, and United States Government bearer bonds. (See Appx. p. 54.)

Upon seizure of petitioner Savings Association, respondent conservator mailed to each of its 16,000 mutual depositor-owners a statement alleging mismanagement and misappropriation by the removed officers and directors.

A run of withdrawals immediately ensued. Over $10,000,000.00 was withdrawn by the terrified savings depositors. Withdrawals amounted to from $1,000,000.00 to $2,000,000.00 a day. (14 F. R. D. 273, at 292.) The run came to an abrupt halt when the United States Courts enjoined respondent conservator from merging the seized savings association, or commingling its seized assets with

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[6]Home Loan Bank Board Order No. 388 of January 17, 1948, text in full is set forth at pages 15 to 16 of Appendix.

other institutions. (14 F. R. D. 273, at 292; see also, Appx. p. 95.)

In January, 1948, after twenty months of conservatorship, respondent conservator returned to the founding management, less than one-fourth of the $26,000,000.00 in assets he had seized, and for which he had refused to give any receipts. (See Appx. pp. 20, 59.)

$7,000,000.00 Debt Fraudulently Created by Respondents.

The savings association, free of debt when seized, was alleged to have become indebted, during the conservatorship, for $6,300,000.00[7] of alleged borrowings by the conservator. About $10,000,000.00 of the seized assets are claimed to have been used to pay withdrawals during the run. This left a $16,000,000.00 remnant of which more than $13,000,000.00 was missing from the Association's premises. (See Appx. pp. 20, 59.) Respondents claim to have pledged part of this as security for such conservator's debt. (See Appx. pp. 21, 60.)

An action to foreclose such $7,000,000.00 conservator's debt against Petitioner Association and shareholders is now pending in the United States Court at Los Angeles, California. The foreclosure complaint filed by respondent Federal Home Loan Bank of San Francisco with the alleged approval of respondent Bank Board, does not even name the removed conservator, the sole signer of the notes, as a defendant. [See C.C.A.-9 Trans. No. 10, p. 2.] Although ordered by the United States District Court so to do, respondents have refused to make such

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[7]Accrued interest is alleged to amount to approximately $700,000.00; such interest and principal combined, total $7,000,000.00.

conservator a party to their own foreclosure complaints. [See C.C.A.-9 Trans. No. 10, p. 2.]

Petitioners shareholders and association are resisting respondents' foreclosure of their seized savings. Petitioners defend on the grounds, among others, that the loan transactions were falsified; that required authorizations and approvals were never obtained; that fraudulent and back-dated sham approvals have been entered in official records by respondents to conceal the non-existence of required authorizations for the $6,300,000.00 loan, that no consideration or value was ever received by the Association or its shareholders for the alleged conservator's $7,000,000.00 debt. (See Appx. pp. 19, 22, 57, 63.)

Respondents have twice filed inadequate and unintelligible attempted accountings with the United States District Court.

The first of such accountings was, after hearing, rejected by the United States Court. (14 F. R. D. 273, at 287-288, and see Appx. p. 23.)

Respondents sought, and obtained from the Court, leave to supplement their first inadequate accounting. (See Appx. pp. 32, 27.)

But neither the first, nor the supplemental accounting discloses any basis or substantiation for approximately $160,000.00 in "conservator's expenses," charged or paid by respondent conservator and Bank Board to themselves, from the seized savings deposits of petitioners. (See Appx. pp. 18, 46.)

During their twenty months' administration of the seized Federal Savings Association and its mutual depositors' savings, respondent conservator claims to have

made between $5,000,000.00 and $6,000,000.00 of new loans upon F. H. A., V. A. or other Government insured security. Such claimed insurance is void because of falsification by respondent conservator of the loan applications. (See Appx. p. 37.)

Depositors Object to Respondents' Accountings on Grounds of Fraudulent Falsification of Records and Misappropriation of Seized Savings.

Petitioner Association and its shareholders' Committee's objections to the accountings charge:

(a) That the $6,300,000.00 of conservator's borrowing (together with $700,000.00 claimed accrued interest) is false, fraudulent and non-existent. That no consideration was received by said Association or its shareholders for the creation of such denied debt. That required authorization and approval for incurring such debt was non-existent and that to cover absence of such required approvals, respondents falsified and back-dated sham approvals. (See Appx. pp. 19, 22, 57, 63.)

(b) That respondent conservator knowingly falsified statements of title condition in the applications for Government insurance of said $5,000,000.00 to $6,000,000.00 of F. H. A. and V. A. loans and that as a result, such Government insurance of said loans is void and non-existent, and said loans are therefore illegal assets for petitioner Federal Savings and Loan Association to own. (See Appx. p. 37.)

(c) That original accounting records, evidencing multi-million dollar transactions of said Association's business, are missing from said Association's premises, removed by respondent conservator or others. Although twice ordered

by the Court so to do, respondents have refused to list or itemize the files, documents, or accounting records they seized. (See Appx. p. 61.)

Over $1,000,000.00 original cancelled checks and one uncashed $100,000.00 check were missing from the Association for over four years after removal of respondent conservator.

Respondents refused to account for, and denied any knowledge of, such 135 missing checks, but in September of 1952, an Assistant United States Attorney delivered them to the Court claiming "they were found in the safe of the office of the United States Attorney." (See Appx. pp. 70, 77.)

(d) That the conservator's bank accounts were created and maintained in violation of law and regulations. That such violation was intentional so as to preclude any audit or verification of the conservator's dealings with petitioners' seized savings. (See Appx. p. 48.)

These are but a few of the many similar multi-million dollar objections to respondents attempted accountings, based upon charges of deliberate falsification, misappropriation and personal corruption. Such objections are pending, awaiting trial before the United States Court at Los Angeles, California.

Court Appoints Special Master to Assist in Accounting.

In January, 1948, the United States Court made its final judgment removing respondent conservator from possession of the seized Savings Association, ordered return of the remnants of the seized assets, and required respondents to file "a full and complete accounting." (14 F. R. D. 273, at 315-321.)

At the same time, by separate order, the Court appointed, as the Court's Special Master, respondent conservator's then attorney, Assistant United States Attorney Ronald Walker. [R. 3, Appeal 12575.]

The appointment of such Special Master was expressly consented to by all respondents.[8]

No appeal was ever taken from the final judgment requiring the accounting, nor from the appointment of respondents' own attorney as the Court's Special Master.

Years passed. The Board finally filed its accountings with the Court. The Special Master held hearings on the accounting and other matters, filed interim reports, and received interim allowances on account of fees. [C.C.A.-9 Trans. No. 2.] No appeals were ever taken from any of these proceedings.

But, in 1950, the United States Court rejected respondents' first inadequate accounting. (See Appx. p. 23.) Respondents appealed from the next, and all further, allowances of fees to the Special Master.[9]

Court of Appeals Reverses Non-appealable Orders.

The orders allowing the fees were interim only, were not final under F. R. C. P. 54(b), and by their terms expressly provided:

> "This is an interim order and is not a final determination of the issues material to the claim for fees for said Special Master as contemplated by Rule

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[8]See photo copy of signatures of respondents' attorneys, opposite page 4.

[9]There were four such appeals, Nos. 12575 (two appeals), 12893, and 13055, in the Court of Appeals.

54(b) FRCP, and the Court reserves the power to modify, alter or amend this order at any time."

Such orders were neither final nor appealable.[10] Respondents nevertheless appealed.

This and three similar appeals from other allowances to the Special Master remained pending undecided before the Court of Appeals from January, 1950 to November, 1953. [C.C.A.-9 Trans. No. 2, p. 5.]

Petitioners and the Special Master, in October, 1951, moved the Court of Appeals to dismiss the four pending appeals from the non-appealable orders. [C.C.A.-9 Trans. No. 2.] The motions to dismiss remained under submission with the Court of Appeals for over two years, until in November, 1953, the Court of Appeals denied the motions to dismiss the appeals, reversed the non-appealable orders and remanded to the District Court with instructions to vacate the orders appealed from.

Court of Appeals Refuses to Consider Merits.

Such summary reversal was on motions of respondents. The appeals were never briefed nor argued, nor was any printed record made [except in Appeal 12575; C.C.A.-9 Trans.]

The Court of Appeals refused to consider the merits.

Respondents, conservator, *et al.*, did not object either in the District Court, nor in the Court of Appeals, to the merits of the rendition of services of the Special Master, their own former attorney, nor the value of his services, nor to the reasonableness of the amounts allowed.

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[10]See Section K, page 40, hereof, "THE ORDERS APPEALED FROM ARE NOT FINAL OR APPEALABLE. THE COURT OF APPEALS IS WITHOUT JURISDICTION."

Their attack was based solely on the alleged lack of jurisdiction of the United States District Court to appoint a Special Master, or to decide the disputed accounting. [C.C.A.-9 Trans. No. 6, pp. 1-3.]

Respondents' attack on the jurisdiction of the United States Courts is based upon an alleged failure of petitioners to exhaust administrative process in 1946, before commencing the action. But their Order No. 388, in January, 1948, was *final* administrative action.

It removed respondent conservator, restored part of the remnants of the seized savings deposits, required respondent conservator to account with petitioner shareholders, and to file such accounting with the United States District Court. (14 F. R. D. 273, at 285.)

The order, by its terms, required that a certified copy of the order be filed with the United States Court, in these proceedings. Such was done. (14 F. R. D. 273, at 285.)

Respondent Conservator's Surety Bond Filed With United States District Court for Enforcement.

Respondents themselves delivered to the Special Master, who has filed with the Court, the $100,000.00 surety bond, furnished by respondent conservator upon his appointment, and held by respondent Board until the first attempted accounting. [Appeal 12575, R. 259-260.]

Delivery of the conservator's surety bond to the Court with the first accounting demonstrates that the administrative process was concluded.

No power exists in respondent Home Loan Bank Board to render money judgments or enforce execution against anyone, least of all, the bonding company on respondent conservator's $100,000.00 bond.

Board Action on Accounting Final and Concluded.

Respondent Board contemplates no further administrative action on the accounting.

In January, 1954, in opposing substitution of successor of Board members, an affidavit of W. W. McAllister, Chairman of respondent Board, was filed with the United States District Court. Such affidavit read in part:

> ". . . that Ammann as conservator has never refused to make an accounting in accordance with Home Loan Bank Board regulations and requirements *but has in fact made such accounting;* . . ."[11]
> (Emphasis added.)

Respondent Bank Board's 1948 order requiring "a full and complete accounting" was final. It has never been revoked or modified.

The United States District Court, in January, 1948, made its final judgment requiring respondents to make "a full and complete accounting." (14 F. R. D. 273, at 320.) Such Court order was never appealed, nor has it been modified or reversed.

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[11]The full text of such affidavit will be found at pages 68 to 69 of the Appendix.

Both Board and Court action are six years or more final.

But the Court of Appeals in 1953, holds that requiring a Federal conservator to account for seized savings deposits are:

> ". . . functions which it has now been determined were beyond the power of the District Court to undertake . . ."

Thereby, Federal conservators who seize millions in uncounted cash and bearer bonds are alone, of all fiduciaries, rendered immune from the inherent power of the United States Courts of equity to compel an accounting and to surcharge for shortages upon the demand of the defrauded beneficiaries.

Specifications of Error.

The Court of Appeals erred when it:

1. Held enforcement of final judgments for accounting against respondents, conservator, *et al.*:

> ". . . present no justiciable controversy within the jurisdiction of the Federal Court, . . . [and are] . . . functions . . . beyond the power of the District Court to undertake."

2. Entertained appeals from orders which, by their terms, were not final nor appealable under F. R. C. P. 54(b).

3. Reversed such non-appealable orders and thereby prevented enforcement of previous five-year final judgments requiring accounting, from which final judgments no appeals were ever taken.

REASONS FOR GRANTING THE WRIT.

A. Public Interest.

The decision of the Court of Appeals creates a dangerous monster, a branch of the executive power of the United States, now authorized to seize millions of uncounted cash and bearer securities and liable to account to no one for what it seizes or for its disposition of the seizures.

The property thus endangered is more than ten billion* dollars of savings deposits. The people whose savings are thus exposed to summary confiscation are the twelve million* savings depositors who have entrusted the savings of their lifetime of toil to the more than fifteen hundred* Federal Savings Association members of the Federal Savings System, created by Congress to "encourage local thrift and local home ownership."[12]

Their average savings deposit is less than $1,000.00* each.

The power to seize and never account (either for what was seized or the disposition made of the seized savings) is a direct violation of the Fourth and Fifth Amendments to the United States Constitution.

Such decision of the Court of Appeals is of first impression. The United States Supreme Court has never decided that conservators for Federal Savings Associa-

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[12]Home Owners' Loan Act of 1933, Title 12, U. S. C. A., Sec. 1464.

*All figures are approximate. Figures are from reports to Congress of Home Loan Bank Board, General Accounting Office, Federal Savings and Loan Insurance Corporation, and similar sources.

tions are immune from accounting to the United States Courts on demand of the depositors whose savings such conservators seize.

B. Respondent Conservator Is a Trustee Charged With Fraud Who Must Fully Account.

The seized $26,000,000.00 of uncounted cash, bearer bonds and negotiable securities are not the property of, nor owned by, respondents conservator or Bank Board.

It represents the deposited savings of 16,000 *mutual* shareholders of the petitioner Federal Savings Association. *Not one dollar of it is Government money.* The 16,000 shareholders are its mutual owners. (See Appx. p. 19.)

Eight years ago the shareholders (through their elected officers) demanded receipts for, and independent audit of their seized uncounted cash, bearer bonds and negotiable securities. (See Appx. p. 45.)

Respondent conservator refused to give any receipts, or permit such independent audits. (See Appx, p. 45.)

Eight years ago, petitioner Shareholders' Committee, representing the 16,000 mutual owners of the seized savings, sued respondents for an accounting. (See Appx. p. 14.)

Petitioners' charges of fraudulent falsification in the creation of a $6,300,000.00 conservator's debt, of total absence of consideration for such debt, of fraudulent falsification of the title condition of property, security for $5,000,000.00 to $6,000,000.00 of F. H. A. and V. A. loans, made by the conservator with petitioners' seized savings, of theft or concealment of accounting documents and records, of unauthorized and unsubstantiated pay-

ments and charges of over $160,000.00 for "conservator's expense," of deliberate illegality in the manipulation of the conservator's bank accounts to prevent audit or verification,[13] are all charges of fraudulent falsification of records (see Appx. pp. 57, 19, 22, 64, 37, 61, 18, 46, 48) and dishonesty, which are violations of the criminal statutes of the United States.[14]

Petitioners' demands for an accounting upon such charges, are met by objections to the jurisdiction of the United States Courts to enforce the Court's final judgment for such accounting.

Respondents have filed thousands of pages comprising tens of thousands of items, as their purported accounting, but they refuse to comply with the United States Court's order to account on the matters exclusively within their own sole knowledge, including how much they paid themselves for "conservator's expense." (14 F. R. D. 273 at 287.)

Unable to meet the requirements of a United States Court for "a full and complete accounting," they attack the jurisdiction and authority of any Court to require them to account.

Their counsel said to the United States Judge at Los Angeles [Tr. Oct. 21, 1953, p. 763]:

> "The Court: That would be the end of the accounting if he just said, well, I got $500,000 and

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[13]These are but a few of the multitude of similar multi-million dollar objections of petitioners to respondents' attempted accounting.

[14]False and fraudulent statements, writings, or documents, made or used, "Within the jurisdiction of any Department or Agency of the United States . . ." are felonies (Title 18, U. S. C., Sec. 1001); as is the affixing of the Seal of such Department or Agency to such fraudulent matter. (Title 18, U. S. C., Sec. 1007.)

I threw it down the rathole? Nobody could say anything about it?

Mr. Silverman: I don't think anyone could.

The Court: You do not think anyone could?

Mr. Silverman: No, sir." (See Appx. p. 13.)

Thus is presented the fundamental question—can a Government fiduciary refuse to account for seized savings deposits upon the demand of the mutual depositors, owners of the Federal Savings Association, who charge fraudulent falsification, misappropriation and dishonesty in the handling of their seized savings deposits?

In *Baker v. Schofield,* 243 U. S. 114, 61 L. Ed. 626 (1917), the Court said (speaking of a National Bank Receiver) at page 119 of the U. S.:

> "That the secret arrangement between Baker and Simpson was fraudulent and a gross breach of the receiver's duty is too plain to require detailed consideration . . . [Citing Authorities.]
>
> ". . .
>
> ". . . Under such circumstances, the trustee . . . can be compelled to restore the property to the authorized representative of the trust estate."

In *Mosser v. Darrow,* 341 U. S. 267, 95 L. Ed. 927 (1950), the Supreme Court said at page 274 of the U. S.:

> ". . . But a trusteeship is serious business and is not to be undertaken lightly or so discharged. The most effective sanction for good administration is personal liability for the consequences of forbidden acts, . . ."

In *Phelan v. Middle States Oil Corp.*, 154 F. 2d 978 (C.C.A. 2, 1946), the Court of Appeals said at page 991:

> ". . . A receiver who has strayed from his duty to the injury of anyone interested in the estate can and should be surcharged . . . The rule that a receiver must not be motivated by personal considerations is prophylactic; its sanction is a surcharge . . . [Citing Authorities.]"

See also:

Woods v. City Nat. Bank, 312 U. S. 262, 85 L. Ed. 820 (1941);

United States v. Howard, 302 U. S. 445, 82 L. Ed. 352 (1938);

Crites v. Prudential Ins. Co. of America, 322 U. S. 408, 88 L. Ed. 1356 (1944);

Jackson v. Smith, 354 U. S. 586, 65 L. Ed. 418 (1921).

Although some Court of Appeals decisions[15] have held the general rule that a fiduciary must account with his beneficiary, inapplicable to National Bank receiverships, no case, until the present opinions of the Court of Appeals (certiorari of which is here sought), has held that a Government official can seize uncounted millions of cash and securities, at his pleasure return one-fourth (See Appx. pp. 20, 59), of the seized assets and refuse to account for, or answer charges of fraudulent misappropriation of, the balance.

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[15]*Cooper v. O'Connor*, 105 F. 2d 761, and 107 F. 2d 207; *Lucking v. Delano*, 122 F. 2d 21.

Presumptions of "official rectitude" cannot prevail to prevent enforcement of final orders of a Government agency and final judgments of a United States Court for "a full and complete accounting" after the United States Court has rejected the officials' first accounting as insufficient.

Surely justice cannot be so blind that it will not look at the accounting of a Government official ordered both by administrative order and Court judgment to account upon beneficiaries charges of falsification of records and misappropriation of seized savings.

C. Respondents' Administrative Order Submitted Accounting to Court for Adjudication.

More than six years ago, respondent Bank Board recognized its fiduciary duties, and by official Order No. 388, required respondent (its conservator) to make "a full and complete accounting" with the United States Court. Such order was:

> ". . . that the Conservator . . . is hereby . . . directed to deliver all of the aforesaid assets, records and books of any and every nature to said shareholders through their authorized representative and to make a full and complete accounting to said shareholders for all assets and liabilities of any and every nature pertaining to said Association, and a copy of such accounting be filed with the District Court of the United States, in and for the Southern District of California."[16]

Thereby, respondents themselves selected the Court below as the appropriate Court, and the within action as the ap-

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[16]For full text of Order see Appendix, pages 14-15.

propriate proceeding, for trial of the issues of the contested accounting.

Respondents' Order No. 388, by its terms, required that a certified copy thereof be filed with the Court below in these proceedings. Both the certified copy of such order and respondents' attempted accounting, were so filed with the Court (14 F. R. D. 273, at 285 and 305). (See Appx. p. 15.) Both were final administrative action and complete exhaustion of the administrative process concerning accounting.

Six years have elapsed since the making of Order No. 388. More than four years since the filing of the first attempted accounting with the Court.

The Court below entered its final judgment. No appeal was ever taken from that final judgment which, by its terms, required "a full and complete accounting."

But now respondents, unable to account, seek to escape their liability by attacks upon the jurisdiction of the United States Courts to compel compliance with the final judgment for "a full and complete accounting."

D. Respondents Are Not Immune From Suit for Accounting.

Respondent conservator by Home Loan Bank Board regulations (C.F.R. Title 24, Sec. 149.4(f)):

> "May, under the direction and supervision of the General Counsel of the Home Loan Bank Board, institute, prosecute, maintain, *defend,* intervene, and otherwise participate in any and all actions, suits or other legal proceedings by and *against the conservator* or association . . ." (Emphasis added.)

Such waiver of sovereign immunity exposes respondents to every judicial process.

See:

Keifer v. R. F. C., 306 U. S. 381, 83 L. Ed. 784 (1939).

F. H. A. v. Burr, 309 U. S. 242, 84 L. Ed. 724 (1940), wherein the Court said at page 245 of the U. S.:

> ". . . when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

And,

R. F. C. v. Menihan, 312 U. S. 81, 85 L. Ed. 595 (1941), wherein the Court said at page 85 of the U. S.:

> ". . . We think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits . . ."

"Judicial process" and "the usual incidents of suits" include accounting and surcharge for fraudulent misappropriation.

E. Administrative Procedure Act Nullified.

The Administrative Procedure Act[17] has been held by the same Court of Appeals in a prior opinion (196 F. 2d 336 at 381-383) to be applicable to this seizure and this litigation. At page 381, the Court said:

> ". . . legislation of the character of the A. P. A. [Administrative Procedure Act] is to be regarded as 'remedial' and 'procedural' and therefore applicable

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[17]United States Code, Title 5, Sections 1001 to 1011, inclusive.

> to pending actions . . . [citing authorities] . . . We agree with the rationale of these cases and hold that *after* September 11, 1946 the effective provisions of A. P. A. were immediately applicable to the pending suits . . ."

The final judgment (14 F. R. D. 273 at 315, 320) for accounting was entered January 23, 1948, *after* the effective date of "A. P. A." Such judgment was based upon final administrative action—respondent Board's Order No. 388, which required such final accounting to be made and filed with the United States District Court.

Such Act provides in part:

> (Sec. 1009, Title 5, U. S. C.)
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Petitioners "suffer legal wrong" within the meaning of said section when respondents charge, or pay, to themselves $160,000.00 from petitioners' seized savings, and refuse any itemization or disclosure of the basis for such payment. (See Appx. pp. 18, 46.)

Petitioners "suffer legal wrong" within the meaning of said Administrative Procedure Act when respondents seize petitioners' savings and obligate them to a fraudulent $7,000,000.00 debt, created by sham and falsified authorizations, and without consideration to petitioners. (See Appx. pp. 19, 22, 57, 63.)

Petitioners "suffer legal wrong" when respondents falsify statements of title condition, and thereby void

Government insurance of $5,000,000.00 of F. H. A. and V. A. loans, made from petitioners' seized savings. (See Appx. p. 37.)

But, in its 1953 opinion, the Court of Appeals holds that actions for accounting for such misappropriation of the depositors' seized savings:

> ". . . present no justiciable controversy within the jurisdicton of the Federal Court . . ."

and are,

> ". . . beyond the power of the District Court to undertake . . ."

In *American Bank v. Federal Reserve Bank of Atlanta,* 256 U. S. 350, 65 L. Ed. 983 (1921), the Court said at page 358 of the U. S.

> ". . . If without a word of falsehood, but acting from what we have called disinterested malevolence, a man by persuasion should organize and carry into effect a run upon a bank, and ruin it, we cannot doubt that an action would lie . . ."

Six years ago, in this same litigation, in *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, 91 L. Ed. 2030, at pages 256-257, the United States Supreme Court said:

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

And remanded to the District Court for trial.[18]

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[18]Mandate United States Supreme Court, August 4, 1947, "And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for proceedings in conformity with the opinion of this Court."

If accounting for fraudulent misappropriation of seized savings of 16,000 mutual shareholders is not one of the "remedies" to which the United States Supreme Court referred, petitioner-depositors, after eight years of struggling for an accounting for their seized savings, respectfully ask the Supreme Court—what, *if any,* are their remedies?

F. Court Has Both Inherent and Statutory Power to Appoint Special Master for Accounting.

The first attempted accounting filed by respondents was over 800 pages, and comprised more than 150,000 items. (14 F. R. D. 273, at 287.)

The need for a special master to assist the Court was obvious.

All United States Courts possess inherent power as Courts of equity to call to their assistance special masters, auditors, and similar judicial aides.

In the Matter of Walter Peterson, 253 U. S. 300, 64 L. Ed. 919 (1920), the Court said at page 312 of the U. S.:

> "Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties . . . From the commencement of our government, it has been exercised by the Federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, . . ."

Further, express statutory authority is conferred upon United States District Courts by F. R. C. P., Rule 53, to appoint special masters, auditors, etc.

Six years ago, respondents recognized the necessity of a special master to assist the Court in adjudication of their attempted accounting. Respondents expressly consented to the appointment of their then attorney (Ronald Walker, an Assistant U. S. Attorney at Los Angeles, California) as special master of the Court to assist the Court's decision of the sufficiency of respondents' accounting. Their consent was in *writing* by signature of their attorneys affixed to the Court's order [R. 3, Appeal 12575] appointing the master.[19] No objection was then made to the jurisdiction or authority of the Court to appoint the master or to hear and decide the accounting.

Administrative remedies and action were exhausted, conclusive and final. The accounting filed by respondents with the Court through their own attorneys was the culmination of the administrative process.

Court adjudication of the sufficiency of that accounting in the light of the shareholders objections was a judicial, not administrative, function.

Entry of judgment for surcharge, if the objections were sustained, and enforcement of the conservator's $100,000.00 surety bond, delivered by respondents themselves into Court for that purpose [Appeal 12575, R. 259-260] were judicial, not administrative functions.

No administrative authority can enter a money judgment or issue execution against anyone, last of all against such bonding company.

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[19]See Signature Plate opposite page 4 hereof for copy of Consent.

G. Exhaustion of Administrative Remedies Is Not a Prerequisite to an Action for an Accounting.

From the moment of seizure of petitioners' deposited savings, on May 20, 1946 (14 F. R. D. 273, at 280), statutes of limitations against action for recovery of the seized savings and for an accounting commenced to run.

The running of such statutes of limitations is neither suspended nor tolled by any administrative process or power. The filing of requests for administrative hearings, or the pendency of administrative proceedings does not extend the time for filing Court action.

In *Unexcelled Chemical Corp. v. United States of America,* 345 U. S. 59, 97 L. Ed. 821 (1953), in a unanimous opinion, this Court said (at p. 65 of the U. S.):

> ". . . A cause of action is created when there is a breach of duty owed the plaintiff . . . The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings . . . have been completed (Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 576, 72 S. Ct. 492; Thompson v. Texas Mexican R. Co., 328 U. S. 134, 90 L. Ed. 1132, 66 S. Ct. 937; General American Tank Corp. v. El Dorado Terminal Co., 308 U. S. 422, 84 L. Ed. 365, 60 S. Ct. 325; United States v. Morgan, 307 U. S. 183, 83 L. Ed. 1211, 59 S. Ct. 795) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were employed. It was from that date that the period of limitations began to run."

Statutes of limitation universally refer to accrual of a cause of action. None attempt to compute time when

the prospective plaintiff is under disability and unable to file any action in any Court.

California Code of Civil Procedure provides:

"CHAPTER I.

Time of Commencing Actions in General.

§312. [Commencement of civil actions.] Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, . . ."

California statutes of limitation are short (90 days to 5 years). All have long since expired.

But, statutes of limitation cannot run unless the action can be filed. Otherwise defendants, by delaying their administrative process, could prevent *any* action being filed until after expiration of the statute of limitations.

In this very case respondents have pled both failure to exhaust administrative remedies[20] and expiration of the statute of limitations.[21] They have claimed the action both premature and too late. Neither defense is decisive of the merits.

H. Demanded "Administrative Remedies" Refused by Respondents.

In January, 1948, more than six years ago, administrative hearings were demanded by certain shareholders of petitioner. (See Appx. p. 92; 14 F. R. D. 273, at 281.)

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[20]Brief for Appellants No. 687, October Term, 1946, page 28, IA: "Judicial relief is not available until appellees have exhausted their administrative remedy."

[21]Answer of Federal Savings and Loan Insurance Corporation, filed June 4, 1951: ". . . this action against this defendant is barred by the statutes of limitations . . ."

Respondents refused and denied such demands upon the grounds that all issues were then pending before the Court below. (See Appx. pp. 92-94.)

Years passed. Statutes of limitation expired, and in September of 1949, more than three years after the seizure, respondents then set (on no one's request) the administrative hearing they had previously refused and denied.

When enjoined from then holding the administrative hearing they had previously refused, respondents appealed and attacked the jurisdiction of the Court—the Court with which they had filed their own accounting, which had appointed their own attorney as the Court's special master, and to which special master's appointment they had signed their express written consent[22] without any qualification or objection whatsoever. Discussing such former appeals, the Court of Appeals said:

> ". . . [this] litigation . . . has previously been before this Court and finally disposed of in Home Loan Bank Board, *et al.* v. Mallonee, *et al,* 196 F. 2d 336, and Fahey, *et al.* v. O'Melveny & Myers, *et al.,* 200 F. 2d 420; cert. denied 345 U. S. 952, rehearing denied 345 U. S. 978. This Court there determined that the District Court was without jurisdiction of the subject matter of either of said consolidated actions . . .
>
> "In view of this Court's previous determination that the said consolidated actions present no justiciable controversy within the jurisdiction of the Federal Court, it necessarily follows that the District Court was and is without authority to proceed in these said consolidated actions or either of them . . .

[22]See Signature Plate opposite page 4.

> ". . . the aforesaid special master was appointed in the said consolidated proceedings to perform functions which it has now been determined were beyond the power of the District Court to undertake. The master was originally appointed . . . to supervise the accounting which the District Court ordered said Ammann to make to Long Beach . . ."

The only reason given why a contested accounting between a Federal conservator and the depositors whose savings he seized should "present no justiciable controversy within the jurisdiction of the Federal Court," and be "beyond the power of the District Court to undertake" is an alleged "failure to exhaust administrative remedies" *before* filing action for the accounting.

I. The Action for an Accounting May Be Filed and Held by the Court, Pending Completion of Administrative Proceedings.

The constitutional authority of a United States Court does not depend upon either administrative action or refusal to act.

"Exhaustion of administrative remedies" affects only the power of the Court to proceed, not its jurisdiction. Some Court must decide whether there actually was an administrative remedy and whether the remedy has, or has not, been exhausted. Such decision of itself is an exercise of jurisdiction.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 95 L. Ed. 912 (1951), the Court said at page 248 of U. S.:

> "The judgment was reversed by the Court of Appeals . . . on the ground that the District Court was without jurisdiction.

". . . Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has . . .

". . . *We think a direction to dismiss for want of jurisdiction was error and that it should not stand as a precedent.*" (Emphasis added.)

See also:

Bell v. Hood, 327 U. S. 678, 90 L. Ed. 939 (1946), at p. 682 of U. S.;

Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308 (1923), at p. 305 of U. S.

Plaintiffs Shareholders' Protective Committee, unable to obtain demanded receipts for their seized $26,000,000.00 of uncounted cash, bearer bonds, etc., filed immediate action for an accounting and for injunction to prevent transfer and dissipation of their seized uncounted cash and bearer securities and for preservation of the only accounts, books, and records in existence itemizing the seized $26,000,000.00. (14 F. R. D. 273 at 280; see Appx. p. 14.)

Respondent conservator was served[28] with summons and restraining order within the district of the United States District Court at Los Angeles, where the assets were seized, plaintiff depositors resided, and petitioner Association's business and premises are located.

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[28]332 U. S. 245, at 247.

Petitioners complaint attacked the seizure as a violation of the United States Constitution, as beyond statutory or any authority of respondents, as malicious, capricious, arbitrary and vindictive.[24]

The Court of Appeals has now (1953) held that such:

> ". . . actions present no justiciable controversy within the jurisdiction of the Federal Court, . . ."

If the Court of Appeals intends to hold that no justiciable controversy can be filed until administrative remedies have been exhausted, this Supreme Court, and other panels of the same Court of Appeals, have repeatedly held otherwise. Such holdings of the Court of Appeals are in direct conflict wth the United States Supreme Court decisions of:

Far East Conference v. United States, 342 U. S. 570, 96 L. Ed. 576 (1952), wherein the Court said at page 576 of U. S.:

> "Having concluded that initial submission to the Federal Maritime Board is required, we may either *order the case retained on the District Court Docket pending the Board's action* [citing authorities], or order dismissal of the proceeding brought in the District Court . . ." (Emphasis added.)

General Amer. T. Car Corp. v. El Dorado Term. Co., 308 U. S. 422-433, 84 L. Ed. 261 (1940), wherein the Court said at page 433 of U. S.:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Com-

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[24]See *Fahey, et al. v. Mallonee, et al.,* 332 U. S. 245, page 247, 91 L. Ed. 2030 (1947), for summarization of plaintiffs' complaint by Mr. Justice Jackson and *Ex parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, for denial of prohibition.

> mission, was involved, the court should have stayed its hand pending the Commission's determination . . . There should not be a dismissal, but, as in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 S. Ct. 916, ***supra,*** the cause should be held pending the conclusion of an appropriate administrative proceeding. ***Thus any defenses the petitioner may have will be saved to it.***" (Emphasis added.)

This holding was reaffirmed in:

> *El Dorado Oil Works v. United States,* 328 U. S. 12, 90 L. Ed. 1053 (1946).

United States of Amer. v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451 (1949), wherein Justice Frankfurter said at page 464 of the U. S.:

> ". . . He may begin by filing his suit in court and ask the court to hold the case until he has obtained an administrative determination from the Commission. There is no jurisdictional bar to such a procedure . . . Cases . . . have clearly recognized that there is jurisdiction to hold the case and this procedure has been suggested in a number of them . . . [citing authorities] . . ."

Thompson v. Texas Mexican R. R. Co., 328 U. S. 134, 90 L. Ed. 1132 (1946), wherein the Court said at page 151 of the U. S.:

> "Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved . . . The judgment will be reversed and the cause ***remanded*** so that ***the case may be held pending the***

conclusion of appropriate administrative proceedings." (Emphasis added.)

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. Ed. 319 (1946), reversing a dismissal for failure to exhaust administrative remedies, the Court said at page 568 of the U. S.:

> ". . . The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding."

and also in direct conflict with:

S. S. W. v. Air Transport, 191 F. 2d 658, (C. C. A. D. C., 1951), wherein the Court said at page 664:

> ". . . The District Court should retain jurisdiction of the antitrust suit while appellant seeks his remedies from the Board . . . The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation . . ."

In *Trans-Pacific Airlines v. Hawaiian Airlines,* 174 F. 2d 63 (C. C. A. 9, 1949), wherein the Court said at page 66:

> ". . . Trans-Pacific was under the jurisdiction of the Board, and the district court had no power to interfere. The District Court of Hawaii therefore had no jurisdiction to proceed, *but should have held the cause in abeyance until the Board made a primary determination* . . ." (Emphasis added.)

J. There Were No Indispensable Parties.

Alleged absence of respondent Bank Board from the territory of the United States District Court at Los Angeles has no affect on the judgment that respondent conservator account.

The Bank Board itself, by its Order No. 388, required respondent conservator to account *with that Court.*[25]

The Bank Board made a general appearance by the filing of a certified copy of its own resolution with the Clerk of that Court.

The District Court so found (14 F. R. D. 273 at 305), and the Court of Appeals said at 196 F. 2d 336, at page 351:

> "The General Appearance Issue."
>
> ". . . the lower court formally found . . . that in January of 1948 the (then) Home Loan Bank Board . . . made a 'general appearance' in this litigation by filing its Order No. 388 . . .
>
> ". . . we do not regard the issue of effective service (or non-service) on Fahey or members of Administration as controlling . . ."

The right to sue the local seizing agent without necessity for joining the Washington, D. C. superior has been repeatedly approved, both by the Court of Appeals for the Ninth Circuit, and the United States Supreme Court. See:

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231 (1949), (affirming C. C. A. 9); and

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95 (1947), (reversing C. C. A. 9).

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[25]For full text of Order No. 388 see page 15 of Appendix.

K. The Orders Appealed From Are Not Final or Appealable. The Court of Appeals Is Without Jurisdiction.

The jurisdiction of the Court of Appeals is wholly statutory. Title 28, United States Code, Section 1291, authorizes appeals only from final orders (with exceptions of no concern here). F. R. C. P. 54(b) limits appealability of interim orders to those to which the District Court affixes its certificate, expressly determining:

(1) That there is no just reason for delay, and

(2) Directing the entry of judgment.

The United States District Court not only refused to make such certification but expressly ruled that the orders were not appealable. Each of the orders appealed from provide:

> "This is an interim order and *is not a final determination* of the issues material to the claim for fees for said Special Master as contemplated by Rule 54(b) F. R. C. P., and *the court reserves the power to modify, alter or amend* this order at any time." (Emphasis added.) [Appeal 12575, R. 125; Appx. pp. 101, 106, 111.]

Without even mentioning either F. R. C. P., Rule 53 or 54(b), the Court of Appeals holds any withdrawal of funds in Court "upon which a lien is claimed" is "final and appealable."

Thereby F. R. C. P., Rule 53(a) which provides:

> ". . . The compensation to . . . a master shall be . . . charged upon such of the parties or paid out of *any* fund or subject matter of the action, which is in the custody and control of the

court as the court may direct . . ." (Emphasis added.)

is repealed.

F. R. C. P. 54 (b) which authorizes the Court to reserve until final judgment apportionment of master's fees among the parties, is likewise repealed.

In *Lyman v. Remington Rand, Inc.*, 188 F. 2d 306 (C. C. A. 2, 1951), the Court said at page 307:

> ". . . The master filed his report . . . recommending a judgment of $940,380.36, . . . the court awarded him a fee of $10,000, and directed the defendant to pay it 'forthwith'—the payment to be included in the taxable costs, if the defendant eventually prevailed . . . The master appealed from this order . . . and the only question is whether it was 'final.'
>
> ". . .
>
> "(2, 3) Before the amendment of Rule 54(b) it would have been. [Citing cases] . . . and, save for Rule 54(b), we should have jurisdiction . . . Nevertheless, the order is within that Rule, as now amended, and is not final in the absence of a certificate by the court for which it provides . . . But upon this record the present appeal must be dismissed."

This rule has been uniformly followed.[26]

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[26] *Dickinson v. Petroleum Conversion*, 338 U. S. 507, 94 L. Ed. 299 (1950); *Republic of China v. American Express*, 190 F. 2d 334 (C. C. A. 2, 1951); *Flegenheimer v. Manitoba Sugar Co.*, 182 F. 2d 742 (C. C. A. 2, 1950); *R. F. C. v. Katz*, 156 F. 2d 215 (C. C. A. 9, 1946); *Lack v. Western Loan & Bldg. Co.*, 146 F. 2d 852 (C. C. A. 9, 1945), cert. den. 324 U. S. 877, 89 L. Ed. 1429 (1945); *Kam Koon Wan v. E. E. Black, Ltd.*, 182 F. 2d 146 (C. C. A. 9, 1950); *Kuly v. White Motor Co.*, 174 F. 2d 742, (C. C. A. 6, 1949); and *Prickett v. Consolidated Liquidating Corp.*, 180 F. 2d 8 (C. C. A. 9, 1950).

The opinion of the Court of Appeals is not only erroneous but is also beyond the appellate jurisdiction of that Court.

Conclusion.

If public faith in the integrity of our Government is to survive, the depositors' charges of fraud, falsification of records, and misappropriation of their $26,000,000.00 of seized uncounted savings must be tried.

Respondents' attempted accounting was rejected as insufficient by the United States District Court.

The Court of Appeals' opinion prevents vindication of respondents if they are innocent, or surcharge if they are guilty.

Such evasion either permits guilty public officials to retain the fruits of their frauds, or leaves honest officials under a lingering cloud of doubt. Neither result should receive Supreme Court approval.

Certiorari should be granted.

Respectfully submitted,

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and

WYCKOFF WESTOVER,
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Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 656

MALLONEE, BUCKLIN AND FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, AND LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONERS

v.

FAHEY, AMMANN, AS CONSERVATOR, HOME LOAN BANK BOARD ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (T. R.[1] 153) is reported at 208 F. 2d 197. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee,* 332 U. S. 245; *Ex parte Fahey,* 332 U. S. 258; *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, certiorari

[1] T. R. refers to the typewritten volume, containing the proceedings had in the Court of Appeals, filed by petitioners in this Court.

denied, 345 U. S. 952, rehearing denied, 345 U. S. 978. See also *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; *Mallonee* v. *Fahey*, 14 F. R. D. 273; and *Mallonee* v. *Fahey*, 117 F. Supp. 259.

JURISDICTION

The judgments of the Court of Appeals were entered on November 23, 1953 (T. R. 154, 155, 156). A timely petition for rehearing, filed on December 23, 1953, was denied on December 28, 1953 (T. R. 159). The petition for a writ of certiorari was filed on March 25, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 1254.

QUESTIONS PRESENTED

1. Whether a plaintiff whose complaint has been dismissed finally and without reservation may thereafter seek review of the dismissal of an ancillary order entered during the litigation.

2. Whether an order directing a party to account, entered before issue has been joined, is *res judicata* so as to survive the dismissal of the complaint.

STATEMENT

Brief description of the basic litigation.—The instant petition and its companion, No. 659, seek to bring before this Court for a third time the exhaustive litigation devised to nullify two actions taken in 1946 by the Federal Home Loan

Bank Commissioner[2] in connection with his functions of supervising the Federal Home Loan Act system. The first step was the readjustment of the Federal Home Loan Bank districts of Portland and Los Angeles and their merger into a new San Francisco district. The second action, which forms the main basis of the instant petition, was the appointment of a Conservator for the Long Beach Federal Savings and Loan Association after an investigation had disclosed *prima facie* evidence of serious irregularities on the part of its management.[3] An injunction obtained by petitioners from a statutory court prohibiting the holding of administrative hearings to determine the appropriateness of this action, and removing the Conservator, was reversed by this Court in *Fahey* v. *Mallonee,* 332 U. S. 245, on the ground "that it was error to oust the Conservator or to enjoin any of his proceedings or to enjoin the administrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted" (*ibid.* at 257–258).

After remand, the proceedings went through a series of extremely complicated procedural stages brought about largely by petitioners' failure to

[2] By virtue of Reorganization Plan No. 3 of 1947 (61 Stat. 954, 5 U. S. C. (Supp. V) 133y–6), the Home Loan Bank Board has succeeded to the functions of the Federal Home Loan Bank Commissioner.

[3] Cf. our Brief in Opposition filed in No. 591, O. T. 1952, pp. 32–34.

cast the issues simply in terms of what was really involved, viz, an attempt to obtain judicial review of the regulation and supervision of the Savings and Loan Association, and their attempt to consider such administrative action as an utter nullity, thus filing pleadings as if the case were "a conventional cause of action in equity by an owner out of possession, to quiet title, to remove a cloud on title, and to regain possession."[4] The reason for this method of pleading, apparently, was petitioners' hope to escape the operation of the rules requiring the exhaustion of administrative remedies and preventing collateral attack upon administrative action, as well as to obtain the benefit of 28 U. S. C. 1335 and 1655, authorizing nationwide service in certain actions involving real property and interpleader. As a result of this theory of action, the length and number of the pleadings, the number of parties drawn into the case, and the record reached astronomical proportions (*Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, 369), and the complexity of the proceedings grew enormously.

Finally, in 1952, five years after the decision of this Court in *Fahey* v. *Mallonee* had been handed down, the Court of Appeals for the Ninth Circuit had occasion to review an injunction granted by the District Court which, in effect, nullified the supervisory powers of the Federal

[4] Cf. Petition in No. 592, O. T. 1952, p. 43.

Home Loan Bank Board over Long Beach Federal Savings and Loan Association. The court reversed the injunction,[5] and in exercising its authority to determine whether there were any insuperable objections to the maintenance of the entire suit,[6] it held that the entire proceedings were subject to dismissal in view of petitioners' failure to exhaust their administrative remedy. *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, 370–371, 378–383. Petitions for certiorari (Nos. 591–596, 658, Oct. T. 1952), submitted and briefed by both sides in the realization that a denial would result in a mandate dismissing the complaint,[7] were denied by this Court. 345 U. S. 952, rehearing denied, 345 U. S. 978.

The Court of Appeals thereupon issued its mandate, dated May 21, 1953, remanding the proceedings to the District Court with directions to dismiss the principal pleadings, including those filed by the petitioners herein (Appendix A, pp. 15–19, *infra*).[8] Pursuant to this mandate, the Dis-

[5] *Home Loan Bank Board* v. Mallonee, 196 F. 2d 336, 383–390, 391.

[6] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52–53, and the authorities there cited; *North Carolina R. R.* v. *Story*, 268 U. S. 288, 292; *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287.

[7] Cf. No. 591, O. T. 1952, Petition, p. 6, first question presented; see also pp. 55–56; our Brief in Opposition, No. 591, pp. 31–32, 46.

[8] The Court of Appeals did not direct the dismissal of the entire proceedings but only of certain pleadings. The reason for this procedure was apparently that a number of

trict Court, on December 11, 1953, dismissed the pleadings filed by petitioners (Appendix B, pp. 20, 22, *infra;* see also *Mallonee* v. *Fahey,* 117 F. Supp. 259, 275–276).

The instant proceedings. The appeal from the injunction which formed the basis for the decision in *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, *supra,* was not the only appeal in this litigation pending in the Court of Appeals. Among others, three appeals (C. A. 9, Nos. 12575, 12893, and 13055) had been noted from three orders awarding a Special Master certain interim allowances of fees to be paid out of funds on deposit in the registry of the District Court. App.* 97–111.

The appointment of the Special Master was closely connected with the termination of the conservatorship by the Home Loan Bank Board in 1948, described in more detail in our Brief in Opposition in No. 591, O. T. 1952, p. 21. At that time, the Board decided to end the conservatorship and, if so requested by an authorized

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home owners who sought to discharge their mortgages during the pendency of the conservatorship had been drawn into this maelstrom of proceedings and had been awarded—unnecessarily, as we believe—judgments directing reconveyances by the trustee. Rather than cast doubt upon the validity of these decrees, the mandate was drawn in such terms as to exempt them from its operation. See our Brief in Opposition in No. 593, O. T. 1952.

*App. refers to the Combined Appendix filed by petitioners in Nos. 656 and 659.

representative of the Long Beach Association, to turn the assets of the Association over to such representative, and also to direct the Conservator to account to the Board as prescribed by the regulations. However, the District Court promptly issued an order directing the Conservator to turn the estate over to the former management of Long Beach and to account to the court, the accounting to be had under the supervision of a Special Master to be appointed by the court. The fee orders on appeal to the Court of Appeals directed payment to this Special Master.

After the Court of Appeals had issued its mandate (in May 1953) in *Home Loan Bank Board* v. *Mallonee, supra,* respondents moved that court to remand the pending appeals to the District Court with directions to vacate the orders awarding the payment of fees to the Special Master and to take further proceedings in conformity with the opinions and judgments of the appellate court (T. R. 92–94). The Court of Appeals granted these motions, and this action forms the basis of the present petition. In its opinion, the court disposed also of an analogous motion to remand and vacate which forms the basis of the petition in No. 659 (T. R. 153).

In answer to petitioners' motion to dismiss the appeals on the ground that they were taken from interlocutory orders, the Court of Appeals held that since the orders directed payment out

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of a special fund upon which a lien was claimed,[10] they constituted a final disposition of a fund in controversy and hence were appealable. With respect to respondent's motion to remand, the court held that its earlier opinions had established that the District Court was without authority to proceed in these actions and that this conclusion required—

> not only the dismissal of the principal pleadings and proceedings, but also the dismissal of matters ancillary thereto. * * *
>
> It appears that the aforesaid special master was appointed * * * to perform functions which it has now been determined were beyond the power of the District Court to undertake.[11]

The orders awarding fees to the Special Master were reversed and remanded with directions to vacate them and the court directed that "proceedings be forthwith had in the * * * District Court in conformity with the order, judgment, and directive herein."

ARGUMENT

Petitioners, in effect, seek a rehearing of the basic question presented to this Court last

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[10] Cf. *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, 431–434, fn. 4.

[11] The court also pointed out that its mandate (*infra*, pp. 15, 18–19) had already directed the return to respondent Federal Home Loan Bank of San Francisco of virtually all the funds in the registry of the District Court, the very source from which the Master's fee was to be paid.

term in Nos. 591–596, and 658, i. e., whether a Federal Savings and Loan Association, when it feels aggrieved by actions of the supervising authorities, may immediately challenge the validity of these protective measures in court by alleging that they were a nullity because "fraudulent,"[12] and thus thwart the administrative processes which Congress has seen fit to approve for the resolution of controversies between the Associations and the Home Loan Bank Board.[13] These problems were fully presented to this Court during the last term in Nos. 591–596, 658, and both parties submitted their briefs on the understanding that the ruling of the Court of Appeals covered not merely the question whether a particular injunction had been properly issued, but that it was intended to dispose definitively of the power of the District Court to entertain the basic action (see *supra*, p. 5). That ruling has now become final and is not open for review.

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[12] The Court of Appeals found "Personal corruption and breach of trust for personal gain are not charged against Administration officials in the instant case." *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336, 380. The objections to the Conservator's accounting are based essentially on the claim that his appointment was a nullity, hence, that he had no authority to bind the Association. Cf. our opposition in No. 591, O. T. 1952, p. 22, fn. 49, and p. 37, fn. 72.

[13] In *Fahey* v. *Mallonee*, 332 U. S. 245, this Court pointed out (at 256) that these limitations imposed for public protection were the price the Association paid in exchange for its charter.

The issues properly involved in the present case are far narrower and of an entirely different nature. They have no bearing on the interpretation of the legislation underlying the Federal Home Loan Bank system. That was accomplished in *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, and *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420, certiorari denied, 345 U. S. 956, rehearing denied, 345 U. S. 978 (Nos. 591–596 and 658, O. T. 1952). All that is involved here is the method employed by a Court of Appeals to dispose of ancillary proceedings once it has been determined finally that the basic action must fail. Since the procedure to be utilized in this type of situation varies from case to case depending upon its posture, the decision below does not present a matter of general importance calling for review by this Court. Moreover, the decision is plainly correct, and there is no conflict.

1. The first obstacle petitioners have to overcome is their complete lack of standing. The judgments direct that certain orders awarding fees to a Special Master be vacated, but the Special Master does not seek review here. We do not know of any authority or principle which would give petitioners the right to litigate further in the interest of the Special Master who is content to accept the judgment below.

It seems, however, that petitioners do not seek so much to review that part of the decision

which vacates the Special Master's fee as to challenge the direction "that further proceedings be forthwith had in the * * * District Court in conformity with the order, judgment and directive herein," which includes the holding of the Court of Appeals that "its previous decisions in this matter require not only the dismissal of the principal pleadings and proceedings, but also the dismissal of matters ancillary thereto" and "that the special master was appointed * * * to perform functions which it has now been determined were beyond the power of the District Court to undertake."

This latter part of the court's direction contemplates not only the *vacatur* of the award of the Special Master's fees but, beyond that, the dismissal of the entire accounting proceedings. We may concede, for the sake of the argument, that petitioners would have standing to challenge this portion of the decree, if they still were parties to the proceedings. Their complaints, however, have been dismissed finally and without reservation (*supra*, pp. 5–6); hence, they are no longer parties and no longer in a position to challenge a decision of the Court of Appeals dealing with tangential aspects of the main litigation. *Lankford* v. *Holton*, 197 Ga. 498; cf. *Armstrong* v. *New La Paz Gold Mining Co.*, 107 F. 2d 453, 454 (C. A. 9).

2. Even if petitioners had standing, they could not show any error in the ruling below. We have here an order directing an accounting granted

prior to the ascertainment of the parties' rights, before even an answer had been filed. Such an ancillary decree is dependent, of necessity, upon the final outcome of the litigation and cannot survive the dismissal of the pleadings upon which it was based. *Minneapolis R. R.* v. *Peoria Ry.*, 270 U. S. 580, 584; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 451; *Greenleaf* v. *Queen*, 1 Pet. 138, 148–149; *Bryan* v. *Smith*, 174 F. 2d 212, 215 (C. A. 7); *United States* v. *De Parcq*, 164 F. 2d 124 (C. A. 7); cf. *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 198–199. The dismissal of the ancillary accounting proceeding is the inevitable corollary of the prior dismissal of the complaints.

Petitioners seek to avoid this inescapable result by claiming that the 1948 order directing an accounting has become *res judicata* and somehow survives the unqualified dismissal of their pleadings. However, it is well established that only final judgments are capable of being *res judicata*. *Merriam* v. *Saalfield*, 241 U. S. 22, 28; *Bohlen* v. *Callaway*, 267 U. S. 479, 485; *Hill* v. *Wampler*, 298 U. S. 460, 466; *United States* v. *Wallace Co.*, 336 U. S. 793, 801; *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199. Even an interlocutory judgment for an accounting rendered after a trial on the merits is not ordinarily considered a final judgment because "the court may change its rulings relating to the merits when the cause comes on for final hearing upon the ac-

count." *Latta* v. *Kilbourn*, 150 U. S. 524, 540; *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, 378; *Deckert* v. *Independence Corp.*, 311 U. S. 282, 291. These considerations apply with even greater force to an accounting order rendered prior to the trial and even before issue had been joined.[14]

[14] The orders from which an appeal was taken here are final and appealable because they direct the payment of the Master's fees out of a fund claimed by an appellant, the Federal Home Loan Bank of San Francisco. As far as the Bank is concerned, payment is final and appealable. *Trustees* v. *Greenough*, 105 U. S. 527, 527–528; *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 169. The failure of the District Court to make the certification provided for in Rule 54 (b) does not affect the finality of the order because it constitutes "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546–547; Moore's *Federal Practice* (2d Ed.) Vol. 6, pp. 235–237. *Lyman* v. *Remington Rand*, 188 F. 2d 306 (C. A. 2), cited by petitioners (Pet. 41), involves the converse situation, where a Master appealed from a decree awarding him only a part of the fee claimed but which left the door open for a reconsideration of his request. Plainly, the finality present in the instant case was completely lacking with respect to the Master in *Lyman*.

Moreover, it should be pointed out that even if the award of the Master's fees should not be considered final and appealable, the court below still had the power to make the order here involved, pursuant to its authority to enforce the mandate issued in *Federal Home Loan Bank* v. *Mallonee*, 196 F. 2d 336. The very considerations against piecemeal appeals which underlie the finality rule support the action of the Court of Appeals in clearing from its docket, and that of the District Court, the remnants of this proliferating litigation once it appeared that the main action could not be maintained.

CONCLUSION

The decision of the court below was correct and in full harmony with its earlier decision which this Court has refused to review. It is respectfully submitted that this petition for a writ of certiorari should likewise be denied.

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APRIL 1954.

APPENDIX A

Nos. 12511 and 12591

United States Court of Appeals for the Ninth Circuit

No. 12511

HOME LOAN BANK BOARD, ET AL., APPELLANTS

v.

MALLONEE, BUCKLIN AND FERGUS, ETC., ET AL., APPELLEES,

AND CONSOLIDATED CASE

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., APPELLANTS

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, ET AL., APPELLEES

No. 12591

JOHN H. FAHEY, ET AL., APPELLANTS

v.

O'MELVENY & MYERS, ET AL., APPELLEES

AND

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, APPELLANT

v.

O'MELVENY & MYERS, ET AL., APPELLEES

Lodged. May 25, 1953. Edmund L. Smith, Clerk. By (S) S. W. Stacey, Deputy Clerk.

Mandate

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division, Greeting:

WHEREAS, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in consolidated causes between Mallonee, Bucklin and Fergus, et al., plaintiffs, third party plaintiffs and cross-claimants, and John H. Fahey, et al., defendants, Civil No. 5421–P. H.; and between Federal Home Loan Bank of Los Angeles, et al., plaintiffs, and Federal Home Loan Bank of San Francisco, et al., defendants, Civil No. 5678–P. H.; wherein an Order of Preliminary Injunction was duly filed, and entered on the 2nd day of December 1949, and wherein an Order re allowance of attorneys' fees on account was duly filed and entered on the 19th day of June 1950; which said orders are of record and fully set out in said causes in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And whereas, the said John H. Fahey, et al., and said Federal Home Loan Bank of San Francisco have appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the

United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And whereas, on the 1st day of May, in the year of our Lord, one thousand nine hundred and fifty-one, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

And whereas, on the 6th day of May, in the year of our Lord, one thousand nine hundred and fifty-two, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

And whereas, said actions were consolidated in the District Court for all purposes, and a review of decisions in both said appeals was sought by appellees upon consolidated petitions for writs of certiorari to the United States Supreme Court, which said petitions were denied on the 4th day of May, 1953:

On consideration whereof, It is now here ordered and adjudged by this Court that the said orders of the said District Court in these consolidated causes be and hereby are reversed and that said consolidated causes be and hereby are remanded to the said District Court with directions to:

1. Dismiss Civil Action No. 5678–P. H. at the cost of plaintiffs.

2. Dismiss the following pleadings in Civil Action 5421–P. H.:

(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the com-

bined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March 1948 until the date of such release.

4. Set aside and vacate said order of preliminary injunction entered the 2nd day of December 1949.

You, therefore, are hereby commanded that such proceedings be had in said consolidated causes, in conformity with the opinions and judgments of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Fred H. Vinson, Chief Justice of the United States, the 21st day of May in the year of our Lord one thousand nine hundred and fifty-three.

(S) PAUL P. O'BRIEN,
Clerk, United States Court of Appeals
For the Ninth Circuit.

APPENDIX B

United States District Court, Southern District of California, Central Division

No. 5421-PH Civil

MALLONEE, ET AL., PLAINTIFFS

v.

FAHEY, ET AL., DEFENDANTS

Filed December 11, 1953. Edmund L. Smith, Clerk. By (S) S. W. Stacey, Deputy Clerk.

Order dismissing pleadings in accordance with mandate

Whereas on December 2, 1949, the above entitled court entered an order of preliminary injunction in the within matter, and

Whereas the following defendants: Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, George K. Bramley and Federal Home Loan Bank of San Francisco appealed therefrom, which appeal was numbered 12511 in the U. S. Court of Appeals for the Ninth Circuit, and was not consolidated with any other appeal, and

Whereas said U. S. Court of Appeals, on April 2, 1952, filed its opinion and made its judgment reversing said order of preliminary injunction,

and its mandate on said appeal, together with the mandate on appeal No. 12591, was received by this court as one document on May 25, 1953, a true and correct copy of said mandate is attached hereto and made a part hereof, and

Whereas the petitions for rehearing of denial of certiorari were denied by the Supreme Court of the United States on June 9, 1953, and the Judgment on said appeals thereafter became final and said mandate was ordered spread on the records of this court on June 24, 1953, and

Whereas on October 12, 1953, there came on for hearing various motions in connection with said mandate and related case No. 13979, which were heard through October 24th, and this court filed a Memorandum of Opinion on November 30th, 1953, which is incorporated herein by reference.

In the above mentioned memorandum it was indicated that upon making the within order the Clerk would be directed to return to Wallis the cashiers check for $50,000 which had been deposited in court by him on filing his cross-claim in interpleader. Further examination of the files and records show that, after hearing, there was allowed and paid to Raymond Tremaine, as attorney for Wallis, the sum of $995.74 necessarily expended by him as costs in connection with his duties as counsel for Wallis (printed record p. 6340), and that there was allowed to him the sum of $27,000 on account as attorney's fees but after stipulation between counsel for all parties the sum of $9,000 was ordered paid on account of fees to said Tremaine as attorney for said Wallis (printed record p. 6527). It further

appears that the total sum thus paid ($9,995.74) to Tremaine was paid from the general funds deposited in court, most of which is, or was at that time, the property of the Long Beach Association and none of it was paid from said $50,000 cashiers check. For the foregoing reasons the $50,000 cashiers check is not now ordered returned to Wallis but will be retained by the Clerk pending motions and decision herein to assess costs in accord with said mandate.

Now, therefore, in compliance with the terms of paragraph 2 (a), (b), (c), (d) and (e) of said mandate,

It is hereby ordered that the following pleadings in civil action No. 5421-PH be, and the same are, hereby dismissed:

The Complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

The cross-claim in interpleader, and all amendmends and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

The United States Attorney will make service of copy of the within Order and file proof of service.

Dated at Los Angeles, California, this 11th day of December 1953.

PEIRSON M. HALL,
Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1954

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1953

No. 659

HOWARD V. ~~CALVERLEY~~ Utley, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Respondents and Appellants Below.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Respondents and Appellants Below.

Receiver's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit With Brief in Support Thereof.

and

Motion for Certiorari Without Printing Additional Record.

W. I. GILBERT, JR.,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Ernest R. Utley as Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term, 1953

No. .....

Appeal No. 13411.

HOWARD V. CALVERLEY, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

Appeal No. 13558.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

MOTION FOR CERTIORARI WITHOUT PRINTING ADDITIONAL RECORD.

To: The Honorable Justices of the United States Supreme Court.

Comes Now Ernest R. Utley, as receiver for Federal Home Loan Banks of Los Angeles, Portland, and/or San Francisco, and for this motion respectfully shows:

Petitioner is a receiver appointed by the United States District Court at Los Angeles, California, for the limited purpose of bringing actions and suing defendants designated by that Court.

Said actions were for the preservation of $6,300,000.00 of notes (with accrued interest of $700,000.00), secured by over $5,300,000.00 of United States Government bonds, $700,000.00 of accrued interest coupons, and approximately $1,000,000.00 in cash; making a combined total of over $14,000,000.00, all on deposit in the registry of said United States District Court. (App. pp. 126, 143, 156.)

Said securities have been so on deposit in said Court for more than six years, during which time various applicable statutes of limitations thereon threatened to expire (and have now expired). (App. pp. 126, 146, 156.)

Expiration of such statutes of limitation would have rendered said assets wholly (or partially) valueless and unenforceable. Upon the eve of such expiration the District Court ordered respondent Bank to file said actions and sue said defendants.

Respondents defied such order of Court and refused to file such actions.

The Court thereupon appointed petitioner receiver. Petitioner, pursuant to order of Court, has sued said defendants and brought said actions. Respondents, except said Bank, are the principal defendants so sued by petitioner, as ordered by the District Court. (App. pp. 135, 130, 144.)

Respondents appealed the order appointing petitioner as receiver to sue them, and when petitioner secured from

the District Court an allowance of costs to defend such appeal, respondents also appealed the order allowing costs. (App. p. 10.)

The Court of Appeals, upon motion of respondents, has, without printing of record on appeal, or briefs, summarily reversed both orders.

The Court of Appeals refused to hear or consider the merits and based its decision solely on an alleged lack of jurisdiction of the District Court to take any action; even to preserve $14,000,000.00 of assets in the registry of the Court from threatened total loss by expiration of statutes of limitations. (App. pp. 4 ff.)

The Court of Appeals has also ordered dismissal of the actions brought by petitioner receiver without consideration of the merits of such actions, and has required petitioner's counsel to return the entire allowance of costs for defending said appeal. (App. pp. 11-12.)

As a result petitioner is without funds to print a record for certiorari, and petitioner's counsel will be required to refund the costs of printing the within certiorari petition.

The record, unprinted in the Court of Appeals, is extremely voluminous, and the cost of printing the entire record would involve many thousands of dollars, and would contain considerable record not relevant to the issues presented.

Respondents have declined to stipulate to applications for certiorari being considered without printing the *entire* record, but have stated they will not oppose motions to the Court for such consideration.

The summary judgment of the Court of Appeals (based entirely upon holding the District Court lacked subject-matter jurisdiction) presents for review only questions of law, the portions of the record pertinent to which are printed in an appendix filed herewith for the convenience of this Honorable Court.

Wherefore, petitioner prays an order of this Honorable United States Supreme Court permitting consideration of the within petition for certiorari upon the record on appeal before the Court of Appeals, and upon the certified record of proceedings before said Court of Appeals.

March 24, 1954.

Respectfully submitted,

W. I. GILBERT, JR.,

Counsel for Petitioner Ernest R. Utley, Receiver, etc.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

HOWARD V. CALVERLEY, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

Receiver's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Ernest R. Utley, as Receiver for Federal Home Loan Bank of Los Angeles, Portland and/or San Francisco,

prays that writs of certiorari issue to review the orders and judgment entered November 23, 1953, in Appeal Nos. 13,411 and 13,558, in the United States Court of Appeals for the Ninth Circuit, entitled:

Appeal No. 13,411.

FAHEY, *et al.*,

Appellants.

vs.

HOWARD V. CALVERLEY, Receiver,

Appellee.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

HOWARD V. CALVERLEY, Receiver,

Appellee.

Appeal No. 13,558.

FAHEY, *et al.*,

Appellants,

vs.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Appellee.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Appellee.

Petitioner respectfully represents:

Statement of Matters Involved.

On March 15, 1952, an order was made in the United States District Court of Los Angeles in the consolidated actions Mallonee, *et al. v.* Fahey, *et al.* (No. 5421-P. H.), and Federal Home Loan Bank of Los Angeles, *et al.* v. Federal Home Loan Bank of Portland, *et al.* (No. 5678-P. H.), appointing your petitioner's predecessor receiver "for the limited purpose of preservation of property on deposit" in the District Court, "and of rights, claims and liabilities of the various parties thereto or thereon and for other purposes." (App.[1] pp. 116 ff.)

Defendants in the consolidated action filed an appeal from this order in the Court of Appeals, and that thereupon the District Court allowed the receiver fees to defend against the appeal. The defendants also promptly filed an appeal from the order allowing fees.

On November 23, 1953, before any record had been printed, and before the matter had been briefed, the Court of Appeals, on motion of the defendants in the consolidated action, made an order remanding the appeal from the appointment of your petitioner as receiver and from the order granting him costs. (App. pp. 11-12.) The opinion of the Court of Appeals incident to the order to remand is 208 Adv. Fed. 2d page 197, No. 2, and appears at pages 4 to 12 of the appendix filed herewith.

It is these orders which petitioner respectfully requests to have reviewed herein on certiorari.

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[1]This reference, as well as all others marked "App." is to the separate appendix filed for the benefit of all petitioners.

Statement.

$7,000,000.00 of Assets Endangered by Reversal of Appointment of Receiver and Dismissal of Actions Brought by Receiver.

The registry of the United States District Court at Los Angeles holds over $14,000,000.00 of assets beneficially owned by the stockholders in Federal Home Loan Banks (member Savings Associations), who are not parties to the litigation and are represented only by petitioner receiver. (App. pp. 129-130, 177.)

Such assets consist of four promissory notes with an unpaid principal balance of $6,300,000.00 and about $700,000.00 accrued interest. Over $7,000,000.00 of United States Government bonds, accrued interest coupons and cash are on deposit with the United States Court as security for said four promissory notes. (App. pp. 126, 143, 147, 166.)

The statutes of limitation have expired on said notes without any actions, except those brought by petitioner receiver, having been commenced before the expiration of such statutes of limitations.

Of the many parties liable on the debt evidenced by said four notes, none have been sued by the payee of said notes, respondent Federal Home Loan Bank of San Francisco, except only Long Beach Federal Savings and Loan Association. (App. pp. 146, 132.)

Said Association has denied all liability on said notes and caused the same to be impounded in the United States Court upon actions for cancellation of said notes as fraudulent, without consideration, and in violation of applicable statutes and regulations. (App. pp. 64, 164, 166.)

Said Association was not the maker of the notes. Respondent Ammann as conservator is the sole signor. (App. p. 128.) Respondent Federal Savings and Loan Insurance Corporation has collected premiums for, and insured and guaranteed repayment of, said $7,000,000.00 of denied obligations. (App. pp. 146, 172.)

Respondent Payee of Notes Is Trustee Which Refuses to Protect Trust Assets.

Respondent Federal Home Loan Bank of San Francisco, named payee of said four notes is a trustee. The beneficial owners of the $7,000,000.00 are the 300 Federal and State savings and loan Associations of the Eleventh Federal Home Loan Bank District. They in turn are trustees for the hundreds of thousands of mutual savings depositors who are the ultimate owners of the imperilled $7,000,000.00. (App. pp. 129-130, 169.)

If said $7,000,000.00 be lost, wholly or in part, through expiration of the statutes of limitation, such loss will render said San Francisco Bank insolvent,[1a] imperil the safety of said 300 member Associations, and will fall directly upon said hundreds of thousands of mutual savings depositors. (App. pp. 129-130, 143, 169.)

How Respondent Trustee Refuses to Protect Trust Assets.

The four notes for $6,300,000.00 were deposited in Court more than six years ago in actions brought by stockholders of the seized Federal Home Loan Bank of Los Angeles and the seized Long Beach Federal Savings and Loan Association who alleged in their respective

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[1a]The District Court so found (App. p. 132).

complaints that the seizures of their bank and association respectively, by respondents in March and May of 1946, were unconstitutional, arbitrary, capricious and malicious.[2] (14 F. R. D. 273, at 280, 282-283.)

In 1952, upon the eve of the expiration of the last of the California statutes of limitations, respondent San Francisco Bank sought leave of the District Court to amend its then four-year filed pleadings. By such amendment, respondent San Francisco Bank sought for the first time in any court to bring or commence actions to enforce, foreclose and protect the then four years past due notes upon which no interest had been paid for almost four years. (App. pp. 135, 143.)

United States District Court Orders Payee of Notes to Sue All Parties Liable Thereon, Including Maker and Insurer.

As a condition to granting permission to respondent San Francisco Bank to amend its four-year filed pleadings, the United States District Court at Los Angeles ordered said respondent Bank in its amended pleadings to sue among others, respondent Conservator Ammann, sole maker of said notes and respondent Federal Savings and Loan Insurance Corporation, insurer and guarantor of said notes and to bring causes of action for money had and received, statutory liability account stated, foreclosure of equitable mortgage and other similar forms of action. (App. p. 135.)

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[2]See *Fahey, et al. v. Mallonee, et al.*, 332 U. S. 245, page 247, for summarization of complaint by United States Supreme Court.

Respondent Payee Refuses to Sue Defendants or Bring Actions Ordered by Court.

Respondent San Francisco Bank, notwithstanding said Court order so to do, refused to sue the defendants or bring causes of action ordered by the Court.

Among the defendants so omitted by respondent Bank were Respondent Ammann as Conservator, and Respondent Federal Savings and Loan Insurance Corporation. (App. pp. 143-144, 146.)

Why Respondent Bank, a Trustee, Refused to Obey Order of United States District Court.

Why the San Francisco Bank refused to sue the parties, at least *prima facie* liable, can be explained by the District Court's findings in appointing petitioner receiver. (See App. pp. 126 ff.)

The Court found that all officers, attorneys and personnel of respondent San Francisco Bank received their salaries only on the approval of respondent Home Loan Bank Board.

That said Board are the sole trustees, *alter ego* and only governing authority of respondent Federal Savings and Loan Insurance Corporation.

That respondent Ammann continues to be an employee of said respondent Bank Board. (App. pp. 145, 171.)

The very suit filed by the San Francisco Bank omitting as defendants conservator Ammann, conservator Ammann's bonding company, Home Loan Bank Board, and Federal Savings and Loan Insurance Corporation, all respondents here, had to be approved by the omitted defendants Home Loan Bank Board before it could be filed by the San Francisco Bank.

Testimony that the action was so approved was given in the District Court by Mose Silverman, Assistant General Counsel for respondents Home Loan Bank Board, (oral testimony affidavit in District Court March 10, 1952).

Court Appoints Receiver to Sue Makers, Insurers and Others Who Payee of Notes Would Not Sue.

At this juncture and in order that suits would be brought on causes of action omitted by San Francisco Bank and to prevent the running of the Statutes of Limitation, the District Court, on March 15, 1952, appointed petitioner's predecessor receiver for the protection of the funds in the Registry of the Court. (App. pp. 116 ff.)

It is noteworthy that a receiver was not appointed until the litigation in the consolidated action had progressed to the District Court and the Court of Appeals and this Honorable Court over a period of over six years. (14 F. R. D. 273, pp. 280-282.)

During that time and before your petitioner's appointment twenty-one writs, appeals and similar court proceedings had been taken. In addition, more than fifty final judgments had been entered quieting title. (14 F. R. D. 273, at p. 306), interpleading assets (14 F. R. D. 273, at p. 308), removing respondent conservator (14 F. R. D. 273, at p. 319), requiring an accounting (14 F. R. D. 273, at p. 320 and 14 F. R. D. 273, at pp. 315-321) and many others.

Petitioner Receiver Was Appointed in Class Action to Protect Beneficiaries Whom Trustee Refused to Protect.

Petitioner receiver was appointed on the application of First Federal Savings and Loan Association of Wilming-

ton, one of the class of 300 stockholder-members of respondent San Francisco Bank. (App. p. 162.)

Said Wilmington Association sought appointment of said receiver to protect it and all other member stockholders and to preserve their savings deposits represented by said four notes with unpaid balance of $7,000,000.00. (App. pp. 126-129.)

Such protection was required in order to preserve the causes of action against the maker of said notes respondent Ammann conservator, said Ammann's bonding company and respondent Federal Savings and Loan Insurance Corporation and others. (App. p. 143.)

Only Appellants From Order Appointing Receiver Were Defendants Which Receiver Sued by Order of United States District Court.

It is significant that the only appellants from the order appointing the receiver and from the order of the Court allowing the receiver costs to defend the appeal from the order appointing him, are (with the exception of San Francisco Bank) all defendants sued by said receiver upon the express direction of the United States District Court. (App. p. 143.)

Court of Appeals Reverses Without Printed Record, Briefing, or Consideration on the Merits.

On motion of appellants, the Court of Appeals has summarily reversed both the order appointing the receiver, and the order allowing the receiver's counsel costs to defend the appeal from the order appointing the receiver. The Court of Appeals has further ordered dismissal without hearing or consideration of the actions brought by the receiver against the defendants sued by express direction of the District Court. (App. p. 11.)

Such action by the Court of Appeals is without any consideration of the merits or facts and is based solely on a claimed lack of jurisdiction of the District Court to take any action to preserve the $14,000,000.00 of assets on deposit in the Registry for more than six years.

By the ruling of the Court of Appeals, the District Court is held without power[3] to even prevent expiration of the statute of limitations upon four notes totalling $7,000,000.00 physically in the custody of the District Court, at the moment when the statute of limitations threatened to expire. (App. p. 143.)

In April, 1952, the United States Court of Appeals had rendered a decision (reported 196 F. 2d 336) and in November, 1952, another decision (reported 200 F. 2d 420) in the consolidated actions. When petitions for certiorari were denied by this Honorable Court the Court of Appeals issued a consolidated mandate directing the District Court to dismiss Federal Home Loan Bank of Los Angeles, *et al.* v. Federal Home Loan Bank of Portland, *et al.* in its entirety and to dismiss certain pleadings only in Mallonee, *et al.* v. Fahey, *et al.*, leaving other pleadings in the consolidated action still pending.

Thereupon, and before a record was printed in the United States Court of Appeals covering San Francisco Bank's two appeals from the orders concerning your petitioner as receiver, and before your petitioner could file briefs to present his side of the matter, San Francisco Bank on the strength of the above-mentioned opinions and mandate, made motions to remand their own appeals

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[3]See Appendix, page 10, where the Court of Appeals said: ". . . The appointment of a receiver was a nullity and the purported receiver was without power to act."

involving the receiver to the District Court, asking that the District Court be directed to vacate the order of the receiver's appointment and the order allowing him costs.

These motions were granted without consideration of the merits of his appointment. The District Court was further summarily directed to dismiss actions which the receiver had brought, although the Court of Appeals did not have any of these actions before it. This action is clearly unprecedented and not even plausible, unless it is noticed that *contrary to its own previous mandate,* the Court of Appeals held in its opinion ordering these sweeping steps, that

> "the District Court was without jurisdiction of the subject matter of either of said consolidated actions."

The opinion containing these rulings and directions is reported in Adv. Fed. 2d, Vol. 208, at page 197, No. 2, issue of January 25, 1954. It is also pages 4 to 12 of the Appendix filed herewith.

Dismissal of Receiver's Action After Expiration of Statute of Limitations May Render Trustee Assets Valueless.

If the judgment of the Court of Appeals be carried out and the petitioner's appointment as receiver be reversed without consideration on the merits, and the actions brought by petitioner receiver be dismissed without hearing or trial, respondents will have succeeded in escaping all liability: (1) by respondent Ammann, conservator sole signer of said notes, (2) Ammann's $100,000.00 Surety bond which would be liable if said notes be unenforceable due to misconduct of said Ammann, and (3) respondent Federal Savings and Loan Insurance Corporation which has charged or collected insurance premiums

aggregating over $200,000.00 based in part upon insurance of said $7,000,000.00 of principal and interest on said notes. Also other respondents will all escape any adjudication on the merits of their liabilities for such obligations.

If Long Beach Association then successfully defends against the foreclosure of said notes, all three hundred savings associations must bear the loss of approximately $7,000,000.00 which will be occasioned thereby.

United States District Court Has Jurisdiction Over Actions Alleging Seizures in Violation of United States Constitution.

The complaints in both actions in the District Court (filed by the Los Angeles Bank stockholders and the Long Beach Association Shareholders' Protective Committees in 1946) both allege that the seizures of their respective institutions were without due process of law, in violation of the Fourth and Fifth Amendments of the United States Constitution, were beyond statutory authority, malicious, arbitrary, capricious and void.

The Long Beach Association's shareholders complaint was before the United States Supreme Court in *Fahey v. Mallonee,* 332 U. S. 245, 91 L. Ed. 2030, and was summarized by the court at page 247:

> ". . . The complaint alleged that the Conservator and the Chairman seized the property without due process of law, motivated by malice and ill will and that the seizure for various reasons was in violation of the constitution . . ."

Pending final decision of these constitutional questions, the District Court appointed petitioner receiver to preserve against the expiration of the statute of limitations,

the notes and assets on deposit in the registry of the court for the benefit of whoever, among the many litigants or non-litigants, was eventually determined to be the true owner thereof.

Questions Presented.

(1) Whether the Court of Appeals incident to a motion to remand appeals and to vacate the orders appealed from, can contradict and enlarge its prior mandate in these actions, issued after its decisions therein had become final by denial of certiorari, which mandate ordered the dismissal only of some of the pleadings in the consolidated action, and state for the first time incident to its ruling on the motions to remand appeals that "the District Court was without jurisdiction of the subject matter of either of said consolidated actions."

(2) Whether a complaint alleging the seizure of private property by Governmental agencies without due process of law and motivated by malice and ill-will in violation of the United States Constitution "present . . . justiciable controversy within the jurisdiction of the Federal Court" or whether such a complaint seeks "functions . . . beyond the power of the District Court to undertake . . ."

(3) Whether the District Court confronted with complaints raising difficult and complicated constitutional and jurisdictional questions incident to which approximately $14,000,000.00 have been interplead in its registry, must stand idly by and permit loss and destruction of these assets by the running of the statute of limitations where the funds in question represent ultimately the life savings of thousands of small depositors, or whether he has power,

until a decision of the question may be had, to appoint a Receiver for the limited purpose of bringing actions on the assets in the registry to prevent their becoming lost or extinguished by running of the statute of limitations.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1.

Court of Appeals Expands and Misconstrues Its Prior Opinions and Mandates.

The present opinion of the Court of Appeals stating "that the District Court was without jurisdiction of the subject matter of either of said consolidated actions" is in direct conflict with prior decisions of the Court of Appeals in the same matter, one of which (196 F. 2d 366) held and stated "that the said order for preliminary injunction be, and the same is, hereby reversed and the court below is directed to vacate and set aside the same injunction" and the other of which (200 F. 2d 420) held and stated "we remand the case before us with directions to the lower court to dismiss the Los Angeles action, said Los Angeles action being only one of the consolidated actions." The mandate issued pursuant to the decisions in 196 F. 2d and 200 F. 2d, when they became final by denial of writ of certiorari, directed the dismissal of the *Los Angeles* action and only the dismissal of certain specified pleadings in the other consolidated action, leaving undismissed and unaffected other pleadings which are sufficient to form a jurisdictional basis for the appointment of your petitioner as receiver.

2.

Important Federal Questions of First Impression Which Vitally Affect the Public Interest.

The opinions of the Court of Appeals pass upon important questions of Federal procedural constitutional law which have not been but should be settled by this Honorable Court. Moreover, the decision vitally affects the safety and stability of the entire Federal Home Loan Bank and Savings and Loan systems throughout the United States. Millions of depositors and borrowers from more than fifteen hundred federal savings and loan associations, quite apart from state building and loan associations which also have business connections with Federal Home Loan Banks, are all vitally affected by the decisions of the questions presented. The entire national policy should encourage thrift and provide institutions which are impartially and efficiently as well as impersonally supervised. This is of vital concern to all persons entrusting their monies to these institutions. The manner of their administration, their stability and their effectiveness are of vital concern to the saving public and to the building trades engaged in home building, and it is important to know whether improper motives, malice and wilfulness and fraud may form a legal basis for the actions of supervising authorities who are entrusted with the fate of these institutions, even though their action otherwise remain within the formal framework of the authority conferred.

3.

Receiver Protects Savings Deposits in Custodia Legis.

Whether or not the right to review finally exists under the pleadings made in these consolidated actions, it was inevitable that large amounts of assets should find their way into the registry of the Court as the outgrowth of the controversy. These monies are largely the life savings of third parties who have no opportunity to represent themselves and protect their interests. It is of the utmost importance for courts to know in constitutional controversies of this type, even though it may eventually be decided that the constitution and federal acts have not been violated, whether courts have power, pending the litigation, to protect the assets of innocent third persons which the controversy has swept into the registry of the Court.

4.

Receiver Sole Protector of Thousands of Unrepresented Depositors.

While the assets deposited in Court represent the savings of thousands of depositors and investors, the litigation concerning them is between savings associations and Federal Home Loan banks and shareholders and stockholders of them, all of whom pursue their own particular interests and advantages. The ultimate owners of the assets, namely, the depositors, remain largely inarticulate and perhaps in most instances unaware of the titanic battle that is waged over their assets. Only a receiver can properly represent them and can properly or effectively and impartially take steps to bring actions which will preserve their interests. The necessity of bringing

these actions in the present instance is a real one. The possible causes of action which will ultimately inure to the benefit of the depositors are directed against plaintiffs, as well as defendants in the pending litigation, among others against Long Beach Association, against the conservator and against the Federal Savings & Loan Insurance Corporation.

5.

Disaster to Result if Receiver's Suits Dismissed.

San Francisco Bank, it is true, has sued Long Beach Association on respondent Ammann's note, but if this action does not succeed, and if the statute has been permitted to run in the meantime against other possible defendants, *the result will be the insolvency and bankruptcy of a Federal Home Loan Bank, whether it is the San Francisco Bank, the Los Angeles Bank or the Portland Bank.* Admittedly, San Francisco Bank does not have assets sufficient to absorb the loss of these causes of action and still remain solvent. It would be calamitous indeed if the District Court under such a situation had no power to prevent this possible result, and if the Court of Appeals could, by dismissing the action in which the receiver was appointed, deprive the receiver of an opportunity to act even before he has been heard.

Wherefore, Your Petitioner Prays that his petition for a writ of certiorari be granted and that the decision of the Court of Appeals be prevented from becoming final before the necessity or justification for his appointment has been inquired into. He therefore respectfully requests that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the

Ninth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals, had in the cases and numbered on its docket Nos. 13,411 and 13,558, as follows:

Appeal No. 13,411.

FAHEY, *et al.*,

Appellants,

vs.

HOWARD V. CALVERLEY, Receiver,

Appellee.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

HOWARD V. CALVERLEY, Receiver,

Appellee.

Appeal No. 13,558.

FAHEY, *et al.*,

Appellants,

vs.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Appellee.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Appellant,

vs.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Appellee.

to the end that these causes may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

Dated: Los Angeles, March 24, 1954.

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley as Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

HOWARD V. CALVERLEY, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

W. I. GILBERT, JR., Attorney for Ernest R. Utley, Receiver,

Petitioner,

vs.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.,*

Respondents and Appellants Below.

Brief in Support of Petition for Writ of Certiorari.

Opinion of Courts Below.

The opinion of the Court in the appeals from the Order Appointing Receiver For The Limited Purpose of Preservation of Property On Deposit In This Court, Etc. (Appeal No. 13,411) and from the Order For Interim Allow-

ance of Costs and Expenses To Defend Appeal From Order Appointing Receiver (Appeal No. 13,558) appear in Adv. F. 2d, Vol. 208, at page 197, No. 2, issue of January 25, 1954. It is also pages 4 to 12 of the Appendix filed herewith.

Jurisdiction.

1. The date of the opinion to be reviewed is November 23, 1953, rehearing denied December 28, 1953, in Appeal Nos. 13,411 and 13,558.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. A. 1254(1).

3. The opinion reverses the following orders of the United States District Court:

(a) The order appointing receiver dated, filed and entered March 15, 1952,

(b) Order for interim allowance of costs and expenses to defend appeal from order appointing receiver filed August 19, 1952, and docketed and entered August 20, 1952.

The opinion directs the District Court—

(a) to dismiss complaint filed by receiver in the Superior Court of the State of California, in and for the County of Los Angeles, and thereafter removed to the said District Court, and

(b) to dismiss the cross-claim filed by said receiver in consolidated action 5421-PH and 5678-PH.

This Honorable Court has power to grant certiorari when orders and judgments of the United States District Court and United States Circuit Court of Appeals are involved.

Statutes Involved.

The pertinent statutes involved are:

Home Owners Loan Act, 12 U. S. C. 1461 to 1468.

Federal Home Loan Bank Act, 12 U. S. C. 1421 to 1449.

Administrative Procedure Act, 5 U. S. C. 1001 to 1010. (App. pp. 1-3.)

Federal Interpleader Act, 28 U. S. C. 1335, 1397 and 2361.

Judicial Code, Par. 57, 28 U. S. C. 118 (now 1655).

The administrative orders involved, to wit: Orders Nos. 5082, 5083, 5084 and 388 are likewise set out in the common appendix. (App. pp. 14, 112 ff.)

Statement of the Case.

A statement of the matter involved has already been made in the preceding petition, under the heading "Statement of Matters Involved." This statement is hereby adopted and made a part of this brief.

Specification of Errors.

A. The Court erred in holding that "the District Court was without jurisdiction of the subject matter of either of said consolidated actions."

B. The Court of Appeals erred in reversing and remanding to the said District Court, Appeals Nos. 13411 and 13558 with directions to—

(1) Vacate the order appointing said receiver, dated, filed and entered March 15, 1952.

(2) Dismiss the complaint filed by said receiver in the Superior Court of the State of California, in and for the County of Los Angeles, and thereafter removed to said District Court, being action 13953-P.H. in the files of said Court.

(3) Dismiss the cross-claim filed by said receiver in consolidated actions 5421-P.H. and 5678-P.H.

(4) Vacate the "ORDER FOR INTERIM ALLOWANCE OF COSTS AND EXPENSES TO DEFEND APPEAL FROM ORDER APPOINTING RECEIVER" filed August 19, 1952 and docketed and entered August 20, 1952.

ARGUMENT.

I.

The United States District Court Had Jurisdiction Over the Consolidated Actions.

The broader aspects of the District Court's jurisdiction over the consolidated actions will not be discussed here, but we make respectful reference to the treatment of that question in other petitions of certiorari filed herein.

II.

The United States District Court Had Jurisdiction to Protect and Decide Upon the Physical Assets Which Had Been Interpled in Its Registry.

The authority of District Courts to protect assets in its registry and custody, whether by the appointment of a receiver or by other appropriate action, has uniformly been upheld.

In *United States v. Morgan* (1939), 307 U. S. 183, 83 L. Ed. 1211, the Supreme Court said at page 193 of U. S.:

> "The district court, in staying the Secretary's order . . . assumed the duty of making the proper disposition of the fund upon the termination of the litigation . . . In taking the payments into custody it acted as a court of equity, charged both *with the responsibility of protecting the fund* and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no under-

taking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. Inland Steel Co. v. United States, 306 U. S. 153, *ante,* 557, 59 S. Ct. 415, . . ." (Emphasis added.)

In *Natural Gas. etc. v. Fed. Power Comm.* (C. C. A. 7, 1942), 128 F. 2d 481, the Court said:

". . . We have, in the exercise of our conferred power, caused a fund to accumulate, and as a court of equity, are charged with the duty of doing complete justice . . . It is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made. It follows that all parties should be restrained from proceeding in other courts."

In *Market St. Ry. v. Railroad Commission* (1946), 28 Cal. 2d 363, 367, 171 P. 2d 875, 878, the Court said:

". . . The excess fares are impounded funds in the custody of the court, although they are represented by the securities on deposit . . . *this court has* the power and *the responsibility of protecting the fund* and of disposing of it in accordance with the applicable principles of law and equity *for the protection of the litigants and the public whose interests are affected* by the final disposition thereof. The court is said to be free, in the discharge of that duty and responsibility, to use broad discretion in the exercise of its powers so as to avoid an unlawful or unjust result . . ." (Emphasis added.)

In *Vallelunga v. Gomes* (1951), 102 Cal. App. 2d 374, 379, 227 P. 2d 550, 553, in disposing of a fund four years after termination of the action in which it was deposited, the Court said:

> ". . . When a court takes custody of a fund *it assumes authority and responsibility over that fund* which it does not necessarily lose upon entry of judgment or dismissal of the action. The applicable statute declares that, . . . a court may order money, or other thing capable of delivery, 'deposited in court * * * upon such conditions as may be just, subject to the further direction of the court.' Code Civ. Proc., §572 . . . This does not suggest that the court may make but a first and final order concerning a deposit. It suggests, instead, a continuing jurisdiction over the deposit throughout the period of the court's custody . . . The statute, clearly is consonant with the principle enunciated in *In re* Shyvers, D. C. Cal., S. D., 33 F. Supp. 643, that a court of equity has the duty of administering funds held in the custody of the law, distributing them to such of the parties as, after due hearing, show themselves entitled thereto, a duty which continues even after dismissal of the action in which the court gained custody . . .' . . . *Moneys paid into court to the credit of a suit in equity in the same court are to be disposed of in that suit, and no orders relating to such moneys can properly be made in another suit which does not include the same parties as the former suit.*" 262 N. W. at pages 457-458. (Emphasis added.)

"The four cases last mentioned were cited with approval by our Supreme Court in support of its statement that after dismissal of an action during

> the pendency of which a court has taken custody of a deposit, that court 'has the power to determine the disposition of funds held *in custodia legis* after notice to all parties interested.' Lord v. Superior Court, 27 Cal. 2d 855, 858, 168 P. 2d 14, 15 . . ."

California cases are cited because California law and procedure concerning deposit in court became part of federal procedure of a District Court sitting in California. (F. R. C. P. Rule No. 64.) California Code of Civil Procedure, Section 572, provides for deposit in Court of money or other assets in dispute.

It has also been uniformly held that assets *in custodia legis* are subject to the authority of the Court to protect them regardless of the outcome of the litigation.

Menasha Wooden Ware Co. v. Southern Oregon Co. (C. C. A. 9, 1917), 244 Fed. 83, wherein the Court said at page 89:

> " 'the court in which a fund has been deposited has power to order distribution of it; and when jurisdiction is once obtained it is not lost either by the abatement of the suit, or by the dismissal of the bill * * *. The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there.' 13 Cyc. 1038 . . ."

Where the questions presented are difficult and complicated, and where the District Court cannot decide instantly whether or to what extent it has jurisdiction, the injunctive process of the court is available to restrain temporarily any acts on the part of the litigants which would interfere with the *status quo*. This doctrine was recently announced

in *United States v. United Mine Workers,* 918 L. Ed. 884, 910-911, 330 U. S. 258, 289-290, where we read:

> "The government's complaint sought a declaratory judgment in respect to the right of the defendants to terminate the contract by unilateral action. What amounted to a strike call, effective at midnight on November 20, had been issued by the defendant Lewis as an 'official notice.' Pending a determination of defendants' right to take this action, the Government requested a temporary restraining order and injunctive relief. The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question. In these circumstances, *the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.*" (Emphasis added.)

If there is equitable power in the courts to enjoin interference with its processes until it can decide whether it has jurisdiction, then by analogy, and *a fortiori,* it must have the equitable power—especially where vital interests of third persons are involved and institutions vital to the general public are threatened with possible insolvency—to appoint a receiver to protect the assets in question until it is decided whether it has jurisdiction. When separate appeals are taken from such an order appointing a receiver, an independent and considered inquiry into the validity of the appointment ought not to be foreclosed by an appellate court summarily dismissing the action before the receiver has even been heard.

III.

If a Constitutional or Federal Question Is Properly Stated, the Complaint Draws With It Into the Jurisdiction of the District Court All Other Matter Raised in the Complaint and the District Court Has Continuing Power to Dispose of All Issues Even Though the Federal or Constitutional Questions Are Decided Against the Persons Raising Them.

If the jurisdiction of the District Court has been properly invoked by raising constitutional or federal questions, the power of the District Court extends to every issue raised in the case regardless of the final outcome of the constitutional or federal issue.

In *R. R. Com. of Cal. v. Pacific G. & E. Co.,* 302 U. S. 388, 82 L. Ed. 319, U. S. Supreme Court 1938, the Court said at page 391 of U. S.:

> ". . . Because of the federal question raised by the bill of complaint, the District Court had jurisdiction to determine all the questions in the case, local as well as federal . . . (citing authorities) . . ."

In *Sterling v. Constantin,* 287 U. S. 378, 77 L. Ed. 375, U. S. Supreme Court 1932, the Supreme Court said at page 393 of U. S.:

> "As the validity of provisions of the state constitution and statutes, . . . are challenged, the application for injunction was properly heard by three judges . . . *the jurisdiction* of the District Court so constituted, and of this Court upon appeal, *extends to every question involved,* . . ." (Emphasis added.)

IV.

Holding Statutes Constitutional Does Not Deprive Court of Jurisdiction.

The original complaints in No. 5421 (the *Mallonee* action), and in No. 5678 (the *Los Angeles Bank* action), and also some amended, supplemental, and later pleadings, alleged a violation of the United States Constitution and of federal acts, so that the District Court's jurisdiction was properly invoked.

The three-judge Court in September of 1946, unanimously decided that Section 5(d) of the Home Owners' Loan Act was unconstitutional. The United States Supreme Court in 1947 reversed and held the Act constitutional. Neither decision could alter or remove the jurisdiction of the District Court properly invoked on the constitutional questions in the first instance.

Jurisdiction does not ebb and flow with the successive denials of writs, reversals of judgments, or other proceedings in the many writs and appeals, and six and one-half years of litigation.

Once invoked by the charge of unconstitutional seizure, the jurisdiction of the Federal Court remains until the final decision of the last issue on the merits.

In deciding the validity of the appointment by a Federal Court of a receiver for a state savings and loan association, the Court said in *Pennsylvania v. Williams,* 294

U. S. 176, 79 L. Ed. 841, U. S. Supreme Court (1935), and companion cases.[5]

> ". . . the present bill of complaint . . . properly invokes the power and the authority, conferred upon the district court by the Constitution and statutes of the United States, to entertain the suit. The bill . . . prays relief which a federal court of equity is competent to give . . .
>
> ". . .
>
> ". . . the district court was not without jurisdiction as a federal court, for these are questions which it is competent to decide. It was therefore invested with authority to hear and make disposition, of the cause, . . .
>
> ". . . The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury from the waste of the assets . . ."

Jurisdiction to decide whether the complaint is sufficient to state a cause of action includes jurisdiction to appoint a receiver to preserve the assets held for six or more years in the registry of the District Court, pending repeated appeals.

In *Bell v. Hood* (1946), 327 U. S. 678, 90 L. Ed. 939, the Supreme Court said at page 682 of the U. S.:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover . . .

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[5]*Pennsylvania General Casualty v. Schnader,* 294 U. S. 189, 79 L. Ed. 850, U. S. Supreme Court (1935); *Gordon v. Ominsky,* 294 U. S. 186, 79 L. Ed. 848, Supreme Court (1935)

> Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy . . ."

The eventual outcome of the litigation, either in favor of, or against, the sufficiency of the original pleadings, is not decisive of the jurisdiction of the District Court to preserve the subject matter of the litigation for final decision by either the Court of Appeals or the United States Supreme Court.

In *Binderup v. Pathe Exchange* (1923), 263 U. S. 291, 68 L. Ed. 308, the Supreme Court said at page 305 of the U. S.:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this *jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged* any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it . . ." (Emphasis added.)

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U. S. 246, 95 L. Ed. 912 (1951), the Court said at pages 248-249 of U. S.:

> "The judgment was reversed by the Court of Appeals for the Eighth Circuit on the ground that the District Court was without jurisdiction.

> "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has . . ."

The Supreme Court has said that in certain types of litigation the question of jurisdiction cannot be decided until a decision on the merits. If such a decision on the merits is postponed for six or more years, past the expiration of all applicable statutes of limitation, the District Court into whose custody $14,000,000.00 of savings deposits are interpled, must possess sufficient jurisdiction to preserve and protect the deposited savings. Otherwise, the eventual decision of the merits may be a nullity if the statute of limitations has run and the deposited savings have become valueless.

The Supreme Court recognized this situation and said in *Land v. Dollar* (1947), 330 U. S. 731, 91 L. Ed. 1209, at page 735 of the U. S.:

> ". . . although as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, *this is the type of case where the ques-*

tion of jurisdiction is dependent on decision of the merits. . . .

"The allegations of the complaint, if proved, would establish that petitioners are unlawfully withholding respondents' property under the claim that it belongs to the United States. . . .

"If respondents are right in these contentions, their claim rests on their right under general law to recover possession of specific property wrongfully withheld. At common law their suit as pledgors to recover the pledged property on payment of the debt would sound in tort."

Further:

". . . But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, . . . the victim . . . may bring his possessory action to reclaim that which is wrongfully withheld.

"It is in the latter category that the pleadings have cast this case . . .

". . . We only hold that the District Court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." (Emphasis added.)

Conclusion.

The Orders of the Court of Appeals together with the directions to the District Court as they appear in 208 Adv. F. 2d 197 (App. pp. 4-12) and as far as they pertain to your petitioner, are unprecedented. In one sense they enlarge upon, and in another they directly nullify the effect of previous decisions in the same case

which had become final by reason of this Honorable Court's denial of certiorari and in a similar sense they enlarge and nullify the mandate of the Court of Appeals based on these final decisions.

The action of the Court of Appeals is unprecedented not only in that it remands appeals, the merits of which it was in no position to pass upon due to the absence of a printed record, but it is unprecedented also in that it directs the dismissal of actions which in no sense of the word could be considered to be before it.

In effect, therefore, it approves the arbitrary refusal of the San Francisco Bank to institute causes of action which would inure to the benefit of the stockholders of the San Francisco Bank and eventually to the benefit of many depositors in numerous Federal savings and loan associations.

Thus the action of the Court of Appeals not only is of immediate and grave concern to all stockholders of the San Francisco Bank and all depositors of its member associations, but beyond that, it presents questions of judicial procedure which certainly are of import beyond the immediate scope of this case. It is surely unusual, to say the least, to dismiss appeals in an action which previous opinions and mandate of the Court of Appeals have left partially pending and to accomplish or justify this by giving previous opinions a meaning and effect which those opinions—now final—never had.

A reading of all opinions in the same consolidated case, 196 F. 2d 366, 200 F. 2d 420, and 208 Adv. F. 2d 197, clearly shows, patent for everyone to see, that the last of these opinions is inconsistent with, and goes beyond, the adjudication of the previous ones.

If the questions discussed in the opinions were of small concern and touched a few individuals only, the matter might not be urgent, but in this case large questions of administrative law, judicial procedure and financial policy which the Federal Government has undertaken to protect, are involved, and therefore a case is presented which, we submit, should be reviewed by this Honorable Court on certiorari.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley, Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

Appendix Reference.

To prevent repetition in the several petitions for certiorari, a combined appendix by certain petitioners is filed herewith, bound as a separate volume. All appendix references in this petition are to such bound appendix.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 659

ERNEST R. UTLEY AS RECEIVER, ETC., PETITIONER

v.

FAHEY, FEDERAL HOME LOAN BANK OF SAN FRANCISCO ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (T. R. 153)[1] is reported at 208 F. 2d 197. Earlier stages of this litigation which have been before this Court include *Fahey* v. *Mallonee,* 332 U. S. 245; *Ex parte Fahey,* 332 U. S. 258; *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; *Fahey* v. *O'Melveny & Myers,* 200 F. 2d

[1] T. R. refers to the typewritten volume, containing the proceedings had in the Court of Appeals, filed by petitioner in this Court.

420, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; see also *Mallonee* v. *Fahey,* 14 F. R. D. 273, and *Mallonee* v. *Fahey,* 117 F. Supp. 259.

JURISDICTION

The judgments of the Court of Appeals were entered on November 23, 1953 (T. R. 157, 158). A timely petition for rehearing, filed on December 23, 1953, was denied on December 28, 1953 (T. R. 159). The petition for a writ of certiorari was filed March 26, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a receiver may challenge an order directing his dismissal.

2. Whether, in the circumstances of this case, a receivership established in two consolidated proceedings can survive the complete dismissal of the first action and the dismissal of all the principal pleadings in the second one.

STATEMENT

This petition, like that filed in No. 656, is based upon the consolidated proceedings involved in *Home Loan Bank Board* v. *Mallonee,* 196 F. 2d 336 (Long Beach action) and *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420 (Los Angeles action), which were before this Court last term on petitions for certiorari (cf. Nos. 591–596, 658, Oct. T. 1952). We respectfully refer to the statement, in our Brief in Opposition filed in No. 656, this

Term, of the history of the Long Beach proceedings. The Los Angeles action, described in more detail in our Brief in Opposition in No. 592, Oct. T. 1952, involved an attempt to challenge the readjustment of the Federal Home Loan Bank districts of Portland and Los Angeles and their merger into the new Federal Home Loan Bank of San Francisco. In an appeal in that suit, occasioned by the award of attorneys' fees out of impounded funds, the Court of Appeals held that the District Court lacked jurisdiction *in personam* over indispensable parties and over the subject matter of that action and remanded the case with directions to dismiss. *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420, 481. This Court denied petitions for writs of certiorari, including one filed by petitioner (No. 594, Oct. T. 1952), 345 U. S. 952, and also petitions for rehearing, 345 U. S. 978.

Thereafter, the mandate issued by the Court of Appeals (*infra,* Appendix A, pp. 12–15) directed the dismissal of the principal pleadings in the Long Beach case (cf. our Brief in Opposition in No. 656, this Term) and the complete dismissal of the Los Angeles action.[2]

At the time the Court of Appeals issued its mandate there were pending before it two addi-

[2] While the District Court complied with the mandate as far as the Long Beach action was concerned, it refused to dismiss the Los Angeles action until the determination of the Master's application for fees proceedings here involved (cf. *Mallonee* v. *Fahey,* 117 F. Supp. 259, 270–273).

tional appeals (C. A. 9, Nos. 13411 and 13558) arising from this complex litigation. No. 13411 involved the appointment of a receiver for the limited purpose of bringing certain litigation (App.[3] 135–137); No. 13558 was occasioned by an order allowing the receiver costs and expenses to be paid out of the funds on deposit with the district court[4] (App. 151–154).

The events which led to the appointment of the receiver may be summarized as follows:[5] While the Conservator was in charge of Long Beach Savings and Loan Association, he had to borrow some $7,300,000, subsequently reduced to $6,300,000, from the Federal Home Loan Bank of San Francisco in order to weather a run on the Association. This loan was secured by a note, government bonds, and notes and mortgages executed by borrowers from the Association.[6] In 1952, the San Francisco Bank brought an action on the note against the Long Beach Association, which, however, denied that it was bound by the Conservator's signature. At the same time, the various plaintiffs in the consolidated actions (*i. e.*, the Long Beach and Los Angeles actions) urged that there were claims against the Conservator,

[3] App. refers to the Combined Appendix filed by petitioners in Nos. 656 and 659.

[4] For a description of the funds deposited with the court see *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, 431–434, fn. 4.

[5] See also our Brief in Opposition in No. 594, Oct. T. 1952.

[6] Cf. our Brief in Opposition in No. 591, Oct. T. 1953, p. 13.

his bonding company, and the Federal Savings & Loan Insurance Corporation, arising from the Conservator's management of the Association, and that San Francisco had refused to bring those actions in spite of the impending expiration of the statute of limitations. The District Court appointed a receiver for the limited purpose of bringing such actions (cf. App. 135, par. 3).

After the Court of Appeals had issued its mandate (in May 1953) in the Long Beach and Los Angeles actions, respondents moved in the Court of Appeals for a remand of appeals Nos. 13411 and 13558, with directions to vacate the order appointing the receiver, to dismiss the pleadings filed by the receiver, or requiring the receiver to do so, and to vacate the order for the allowance of costs and expenses, and also directing the receiver's attorney to return $1,605.79 theretofore paid to him (T. R. 89–91).

The Court of Appeals granted the motions (T. R. 153). It held that since the two earlier decisions had established that the District Court lacked jurisdiction to maintain either of the two consolidated actions, the receivership, being of an ancillary nature, could not be maintained and its costs could not be charged to the funds in court.

ARGUMENT

Petitioner is a receiver whose appointment has been ordered vacated on the ground that the proceeding in which he had been appointed has

been ordered to be dismissed. The great bulk of the petition is devoted to an attempt to show that the Court of Appeals erred when it held that the Los Angeles and Long Beach actions could not be maintained. To this extent petitioner is merely seeking an untimely rehearing of the petition filed by him during the last term (cf. No. 594, Oct. T. 1952)[7] (in which he himself contended that the dismissal by the Court of Appeals of the action in which he was appointed had the clear effect of removing him and of terminating his authority to do anything further in the suits he had started).[8] We need not repeat our answers to the attack on the appellate decrees in the main actions, and the narrower issues pertinent to the present case certainly do not call for review.

1. At the very outset, petitioner is confronted with the jurisdictional obstacle that a receiver, being an arm of the court[9] cannot seek review of an order discharging or removing him. *Bosworth* v. *Terminal Railroad Association,* 174 U. S. 182, 189.[10] But even disregarding this initial bar-

[7] Note the virtual identity of the petition filed in No. 594, Oct. T. 1952, pp. 26–36, with pages 25–35 of the instant petition.

[8] See p. 2 of petitioner's reply to respondent's Brief in Opposition in No. 594, Oct. T. 1952.

[9] Upon appeal, the receiver becomes an arm of the appellate court. *Jones* v. *Stewart,* 61 S. W. 105 (Tenn.).

[10] A receiver, it is true, may appeal from an order disallowing him his commissions or fees. *Bosworth* v.

rier, petitioner cannot succeed. The dismissal of the entire Los Angeles proceeding and of the principal complaints in the Long Beach action annulled and rescinded, of necessity, all proceedings ancillary to the consolidated actions, regardless of whether the dismissal was for lack of jurisdiction or on the merits.[11] *Minneapolis R. R.* v. *Peoria Ry.*, 270 U. S. 580, 584; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 451; *Loeb* v. *Willis*, 100 N. Y. 231. And these considerations apply with special force to a receivership, which is always ancillary and never an end in itself. *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377, 380–381; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S.

Terminal Railroad Association, *ibid.* The decision below, however, does not deprive petitioner of his right to be compensated; it merely holds that he may not be paid out of the receivership estate.

[11] Petitioner argues strenuously that, despite the statement of the Court of Appeals to the contrary, only the Los Angeles complaint was dismissed for lack of jurisdiction. Apart from the considerations that the receivership must fall if the complaints upon which it is based are dismissed for any reason and that the Court of Appeals is best equipped to determine whether it dismissed the complaints in the Long Beach case on jurisdictional grounds or on the merits (*McCormick* v. *Puritan Coal Mining Co.*, 41 F. 2d 213, 214 (C. A. 3)), the opinion of the Court of Appeals in the Long Beach case is plainly couched in jurisdictional language (cf. 196 F. 2d 336, at 370–371, 378–379, 383). The dismissal of the complaints was based upon the failure to exhaust administrative remedies, a jurisdictional ground. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 48–49; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 764.

491, 497; *Bryan* v. *Smith*, 174 F. 2d 212, 215 (C. A. 7).

2. The subsidiary nature of the receivership disposes of petitioner's argument that the further prosecution of the lawsuits filed by him would be in the interest of the Federal Home Loan Bank of San Francisco and its stockholders. There cannot be a receivership in the absence of supporting proceedings against the Federal Home Loan Bank. Moreover, the question whether or not an action should be brought is one entrusted to the discretion of the management of the Bank,[12] which is an instrumentality of the United States. Cf. *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 331; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102; *Fahey* v. *O'Melveny &*

[12] We submit that the San Francisco Bank properly abstained from bringing those actions. A suit against the Federal Savings & Loan Insurance Corporation would be unavailing, since its liability becomes due only in the event of a default by the insured institution. National Housing Act of 1934, Section 405 (b), as amended (64 Stat. 259, 894, 12 U. S. C. (Supp. V) 1728). As far as the Conservator and his bonding company were concerned, he had accounted to the satisfaction of the Home Loan Bank Board. (See our Brief in Opposition in No. 591, Oct. T. 1952, p. 37, fn. 72.) The authority of the Conservator to borrow $7,300,000 from the Federal Home Loan Bank of San Francisco, on behalf of the Long Beach Association, was beyond question after this Court, in *Ex parte Fahey*, 332 U. S. 258, 260, and the court below, in *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336, 381, had upheld at least the interim status of the Conservator. See also *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, fn. 4, at p. 434, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978.

Myers, 200 F. 2d 430, 445–447, certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978.

3. Since the District Court lacked jurisdiction to entertain the petition for the appointment of the receiver, the cost of the receivership could not be charged to the estate. *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 373; *Noxon Chemical Products Co.* v. *Leckie,* 39 F. 2d 318 (C. A. 3), certiorari denied, *sub nom. Robb* v. *Noxon Chemical Products Co.,* 282 U. S. 841; *Home Mortgage Co.* v. *Ramsey,* 49 F. 2d 738 (C. A. 4); *South Side Theatres* v. *United West Coast Theatres Corp.,* 178 F. 2d 648 (C. A. 9). However, even if we assume for the sake of argument that the receivership failed because one of the underlying complaints was dismissed on the merits rather than for jurisdictional reasons, the court could properly determine that the cost of the receivership should be borne by the unsuccessful plaintiffs rather than by the estate. Cf. *Burnrite Coal Co.* v. *Riggs,* 274 U. S. 208, 214; *Bowersock Mills & Power Co.* v. *Joyce,* 101 F. 2d 1000, 1002–1003 (C. A. 8).

CONCLUSION

The decision below is correct. There is no conflict, and no problem of general importance is

involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1954.

APPENDIX A

No. 12511

No. 12591

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lodged May 25, 1953. Edmund L. Smith, Clerk
By (S) S. W. Stacey, Deputy Clerk

No. 12511

HOME LOAN BANK BOARD, ET AL., APPELLANTS

v.

MALLONEE, BUCKLIN AND FERGUS, ETC., ET AL., APPELLEES

and consolidated case

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL., APPELLANTS

v.

FEDERAL HOME LOAN BANK OF LOS ANGELES, ET AL., APPELLEES

No. 12591

JOHN H. FAHEY, ET AL., APPELLANTS

v.

O'MELVENY & MYERS, ET AL., APPELLEES

and

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, APPELLANT

v.

O'MELVENY & MYERS, ET AL., APPELLEES

MANDATE

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division, Greeting:

Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in consolidated causes between Mallonee, Bucklin and Fergus, et al, plaintiffs, third party plaintiffs and cross-claimants, and John H. Fahey, et al, defendants, Civil No. 5421–P. H.; and between Federal Home Loan Bank of Los Angeles, et al, plaintiffs, and Federal Home Loan Bank of San Francisco, et al, defendants, Civil No. 5678–P. H.; wherein an Order of Preliminary Injunction was duly filed, and entered on the 2nd day of December, 1949, and wherein an Order re allowance of attorneys' fees on account was duly filed and

entered on the 19th day of June, 1950; which said orders are of record and fully set out in said causes in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And whereas, the said John H. Fahey, et al, and said Federal Home Loan Bank of San Francisco have appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And whereas, on the 1st day of May, in the year of our Lord, one thousand nine hundred and fifty-one, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

And whereas, on the 6th day of May, in the year of our Lord, one thousand nine hundred and fifty-two, the said consolidated causes came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted.

And whereas, said actions were consolidated in the District Court for all purposes, and a review of decisions in both said appeals was sought by appellees upon consolidated petitions for writs of certiorari to the United States Supreme Court, which said petitions were denied on the 4th day of May, 1953:

On consideration whereof, It is now here ordered and adjudged by this Court that the said orders of the said District Court in these consolidated causes be and hereby are reversed and that said consolidated causes be and hereby are remanded to the said District Court with directions to:

1. Dismiss Civil Action No. 5678–P. H. at the cost of plaintiffs.

2. Dismiss the following pleadings in Civil Action 5421–P. H.:

(a) The complaint of Mallonee, Bucklin and Fergus, and all amendments and supplements thereto, at the cost of said complainants;

(b) The cross-claim and third party complaint of Long Beach Federal Savings and Loan Association, and all amendments and supplements thereto, at the cost of third party complainant and cross-claimant;

(c) The cross-claim of Federal Home Loan Bank of Los Angeles, and all amendments and supplements thereto at the cost of said cross-claimant;

(d) The cross-claim in interpleader of Title Service Company, and all amendments and supplements thereto, at the cost of said cross-claimant;

(e) The cross-claim in interpleader, and all amendments and supplements thereto, of Robert H. Wallis, at the cost of said cross-claimant;

3. Dissolve, set aside and vacate the order of said District Court entered the 13th day of March, 1948, insofar as the same requires Federal Home Loan Bank of San Francisco to deposit in the Registry of said District Court promissory

notes in the aggregate principal amount of $6,300,000.00, collateral securing the same and any other documents or property deposited by San Francisco Bank pursuant to said order; and return to Federal Home Loan Bank of San Francisco without charge or impairment said promissory notes, together with Government bonds in the face amount of $5,300,000.00 with all interest coupons attached thereto at the time of deposit and together with cash from the sum in the Registry of said Court sufficient to make the combined total sum of $6,324,098.35, with interest on $6,300,000.00 at 2% per annum from the 10th day of March, 1948 until the date of such release.

4. Set aside and vacate said order of preliminary injunction entered the 2nd day of December, 1949.

You, therefore, are hereby commanded that such proceedings be had in said consolidated causes, in conformity with the opinions and judgments of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness, the Honorable Fred H. Vinson, Chief Justice of the United States, the 21st day of May in the year of our Lord one thousand nine hundred and fifty three.

(S) PAUL P. O'BRIEN,
Clerk, United States Court of Appeals
for the Ninth Circuit.

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